IN THE

Supreme Court of the Anited States

No. 663.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellants,

US.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, ET AL.

No. 664.

BURNHAM, MUNGER, HANNA DRY GOODS Co.,

Appellants,

272.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, ET AL.

Motion of Everett W. Burdett and Frederick Manley Ives for Leave to File a Brief in the Above Entitled Cause as Amici Curiae in Behalf of the Boston Chamber of Commerce, et al.

Respectfully represent Everett W. Burdett and Frederick Manley Ives, Attorneys and Counsellors at Law—

That Boston Chamber of Commerce, Boston, Mass., Merchants' Association of New York, New York City,

Chamber of Commerce of the State of New York, New York City, Philadelphia Chamber of Commerce, Philadelphia, Pa.,

Richmond Chamber of Commerce, Richmond, Va. New Haven Chamber of Commerce, New Haven, Conn.,

Somerville Board of Trade, Somerville, Mass., Springfield Board of Trade, Springfield, Mass., Marlboro Board of Trade, Marlboro, Mass., Worcester Board of Trade, Worcester, Mass.,

Worcester Branch National Metal Trades Association, Worcester, Mass.,

Hampden County Traffic Association, Chicopee Falls, Mass.,

Westerly Board of Trade, Westerly, R. I. Haverhill Board of Trade, Haverhill, Mass.,

Rochester Board of Trade, Rochester, New Hampshire,

Providence Board of Trade, Providence, R. I., and Bellows Falls Board of Trade, Bellows Falls, Vermont,

are all commercial organizations, the membership of which includes, among others, a very large number of the manufacturers and jobbers or wholesalers of what is known in railroad classification as Atlantic Seaboard territory.

That said commercial organizations, through their said members, are vitally interested in the questions raised by this appeal.

That said commercial organizations have retained your petitioners to endeavor to obtain leave to file a brief in this cause in their behalf in support of the order of the Interstate Commerce Commission.

Wherefore your petitioners respectfully pray that they may be granted leave to file a brief in this cause as amici curiae in behalf of the said commercial organizations.

EVERETT W. BURDETT. FREDERICK MANLEY IVES.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 663.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION,

Appellants,

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, ET AL.

No. 664.

BURNHAM, MUNGER, HANNA DRY GOODS Co., Appellants,

US.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, ET AL.

BRIEF OF AMICI CURIAE

IN BEHALF OF

The Boston Chamber of Commerce, Merchants' Association of New York, Chamber of Commerce of the State of New York, Philadelphia Chamber of Commerce, Richmond Chamber of Commerce, New Haven Chamber of Commerce, Somerville Board of Trade, Springfield Board of Trade, Marlboro Board of Trade, Worcester Board of Trade, Worcester Branch National Metal Trades Association, Hampden County Traffic Association, Westerly Board of Trade, Haverhill Board of Trade, Rochester Board of Trade, Providence Board of Trade and Bellows Falls Board of Trade, Manufacturers and Wholesalers of Atlantic Seaboard Territory;

AND IN SUPPORT OF THE POSITION OF APPELLANTS.

STATEMENT OF FACTS AND OF THE INTEREST OF MANUFACTURERS AND WHOLESALERS OF THE ATLANTIC SEABOARD TERRITORY.

Upon the complaint of certain individuals, partnerships and corporations engaged in the jobbing or wholesale trade at Kansas City and St. Joseph, Missouri, and Omaha, Nebraska (the Missouri river cities) against the class rates charged by the appellee railroads on through freight shipped to the complainants from the Atlantic seaboard, on the ground that they were unreasonably high and unjustly discriminatory under the Interstate Commerce law, the Interstate Commerce Commission on June 24, 1908, after a full hearing, issued an order reducing the through class rates from

| | Classes | 1 | 2 | 3 | 4 | 5 |
|----|----------------|-----|-----|----|----|----|
| to | Rate in cents. | 147 | 120 | 93 | 68 | 57 |
| | • | 1 | 2 | 3 | 4 | 5 |
| | | 136 | 113 | 88 | 64 | 54 |

by requiring the appellee railroads to reduce that part of the through rate which applied to the haul between the Mississippi and Missouri rivers from

| | 1 | 2 | 3 | 4 | 5 |
|----|----|----|------|----------|---------|
| to | 60 | 45 | 35 | 27 | 22 |
| 10 | 1 | 2 | 3 | 4 | 5 |
| | 51 | 38 | 30 | 23 | 19 |
| | | | (Rec | ord, pp. | 21-35.) |

The appellee railroads then filed this bill of complaint against the Commission in the Circuit Court for the Northern District of Illinois, Eastern division, alleging, among other things, that said order of the Commission was beyond its powers, and reduced the rates in question so that they were unreasonably low and unduly and unjustly discriminatory.

A majority of the justices of the Circuit Court decided, not that the rates ordered by the Commission were unreasonably low or unjustly discriminatory, but that the Commission in its order, by proceeding on an erroneous theory of the power given it by the act, had exceeded its powers so that the order made was unlawful and should be enjoined.

Chicago, etc., Ry. Co., vs. Interstate Commerce Com., 171 Fed R., 680. (Record, p. 1053.)

The Interstate Commerce Commission and certain codefendant intervenors duly appealed from the decree of the Circuit Court to this Court. (Record, pp. 1071-1083.)

The parties in whose behalf this brief is filed as amici curiae are various trade and commercial organizations in what is known as the Atlantic Seaboard cities,* that is, the territory in which the through freight that is entitled to the reduced rates, according to the order of the Commission, originates.

^{*}See Resolutions of New England Board of Transportation, a department of the Boston Chamber of Commerce (Record, p. 650).

These parties are interested in the dissolution of the injunction and the enforcement of the Commission's order in a somewhat different way than the Missouri River jobbers or wholesalers, who were the original complainants before the Interstate Commerce Commission.

In the Missouri River territory the persons most interested are the wholesalers, who desire to be able to secure goods manufactured in the Atlantic Seaboard territory at a cost not made unreasonably high by excessive freight rates.

In the Atlantic Seaboard territory there are two classes of trade interested, the wholesalers, whose interests are the most affected and the manufacturers.

The Boston wholesaler (taking Boston as an example of an Atlantic Seaboard city) is at a disadvantage in competing with the St. Louis wholesaler in Omaha, for instance, because of the local freight rate the Boston man is obliged to pay to get goods to Boston. The Boston wholesaler buys goods at a factory in Gardner, Maine, for example, and pays 15 cents a hundred, first class, to have them carried to Boston. For the through haul Boston to Omaha he must, under present rates, pay 147 cents a hundred (87 cents to Mississippi river plus 60 cents, Mississippi river to Omaha), so that the freight charges for him are 162 cents to Omaha. The St. Louis wholesaler, on the other hand, pays 87 cents on the same kind of goods for the haul from Gardner to St. Louis, and may re-ship them to Omaha for 60 cents; or in other words, it has cost him only 147 cents to carry the same kind of goods from Gardner, Maine, to Omaha. Thus the Boston wholesaler is discriminated against and pays more freight than the St. Louis wholesaler for exactly the same haul, because he trans-ships at Boston, which is not a rate-breaking point, whereas the St. Louis man trans-ships at St. Louis, at which point the rates to the Missouri River cities break.

In the case of New York the discrimination is equally glaring; the rates from manufacturing points in Connecticut to New York being added on goods rehandled in New York and not on goods rehandled in St. Louis. A similar condition exists at Philadelphia, Baltimore, Richmond, New Haven, Worcester and all cities in Atlantic seaboard territory.

Obviously, therefore, the wholesaler in the Atlantic seaboard territory is interested in any reduction of the through rate from the Atlantic seaboard territory to the Missouri River cities which tends even in a small way to do away with the artificial advantage accruing to the wholesalers located on the Mississippi River crossings, by virtue of the fact that said through rate breaks at the Mississippi River; that is, is equal to the sum of the rates from the seaboard to the Mississippi River and from the Mississippi River to the Missouri River.

The Atlantic seaboard manufacturer, like the wholesaler of the Missouri River cities, is interested in the question because of his desire to have his goods carried as cheaply as possible to the Missouri River cities, so that he may there compete with the same kind of goods manufactured in other places. It makes no difference to the seaboard manufacturer whether his goods are sold in the Missouri River cities by a Kansas City wholesaler or by a St. Louis or a Boston wholesaler, but it is a source of serious loss to him if he or they are unable to sell his goods in the Missouri River cities because the freight rates are unreasonably high. A shoe manufacturer in St. Louis, for example, selling goods in Kansas City, is entitled to all the advantage he has over the manufacturer of shoes in Boston, by virtue of his being nearer to the raw material and being able to employ cheaper labor, in addition to his being nearer to Kansas City; the Boston shoemaker is likewise entitled to the advantage he may have because he is able to employ more experienced and skillful workmen; but the Boston manufacturer selling his shoes in Kansas City should not, in addition to the other disadvantages he suffers when competing with the St. Louis manufacturer, be handicapped by un unreasonably high freight rate further to protect the industry of the St. Louis man. (See Record, pp. 644-5.)

A railroad rate may not be kept at an unreasonably high figure so that it may operate as a protective tariff against goods manufactured at a distance to protect goods manufactured nearby.

Interstate Commerce Commission vs. Louisville N. R. Co., 118 Fed. R., 613, 623.

As has been stated, the Commission reduced the class rates on through freight from the Atlantic Seaboard to the Missouri River cities, which were the sums of the rates from the Atlantic seaboard to the Mississippi River and from the Mississippi to the Missouri River, so that the through class rates were less than these sums.

Believing that it might be improper to argue technical questions of practice in behalf of persons who are not parties to the Record, there will be discussed in this brief only the questions raised by the 15th assignment of error of the Interstate Commerce Commission, and the 5th and 7th assignment of error of the co-defendant intervenors.

Said 15th assignment is as follows:

"Said Circuit Court erred in holding that there was no inquiry by the Interstate Commerce Commission respecting the reasonableness or unreasonableness of the rates between the Mississippi River and the Missouri River other than on the zone theory of apportioning trade." (Record, p. 1074.)

Said 5th assignment is as follows:

"The Court should have found that the said order of the Interstate Commerce Commission of June 24, 1908, did not produce any undue or unreasonable discrimination against any person, company or locality, or give any undue or unreasonable preference or advantage to any person, company or locality." (Record, p. 1082.)

Said 7th assignment is as follows:

"The Court should have found that the rates established by the Interstate Commerce Commission in its order of June 24, 1908, between the Mississippi River crossings and the Missouri River cities on business originating in the Atlantic seaboard territory, and consigned to the Missouri River cities, Kansas City and St. Joseph, Missouri, and Omaha, Nebraska, were and are just and reasonable rates and would yield to the complainant railroad companies fair and reasonable compensation for the service performed." (Record, p. 1082.)

Under these assignments of error the following points will be made:

- (1) That the Circuit Court misinterpreted the order of the Commission in finding therein a claim to exercise or the exercise of an unlawful power. (Under 15th assignment of the Interstate Commerce Commission.)
- (2) That the rates ordered by the Commission are not unreasonably low. (Under the 7th assignment of the codefendant intervenors.)
- (3) That the rates ordered by the Commission are not unduly or unjustly discriminatory. (Under the 5th assignment of co-defendant intervenors.)

ARGUMENT.

1. THE CIRCUIT COURT MISINTERPRETED THE ORDER OF THE COMMISSION IN FINDING THEREIN A CLAIM TO EXERCISE OR THE EXERCISE OF AN UNLAWFUL POWER.

The decision of the majority of the Circuit Court in granting the injunction was based not on the fact that the result reached by the Commission in its order was wrong, but on the ground that the theory upon which the Commission acted in fixing the rate was wrong and illegal, because not within its power. The power which the court believed the Commission was exercising was one artificially to divide up the country into trade zones tributary to given trade and manufacturing centers; and to support its belief, the court quotes two isolated sentences from the opinion of the Commission.

Chicago, etc., Railway Co. vs. Interstate Commerce Commission, 171 Fed. R., 680, 684. (Record, p. 1057.)

Whether or not the majority of the Court was correct in denying the Commission this power, is not material here, for it is believed that, looking at the Commission's opinion as a whole, it is impossible to find a claim to or the exercise of any such power.

It is the duty of the Commission to investigate, upon a proper complaint, whether rates complained of are unreasonably high or unjustly discriminatory, and to determine what are reasonable and just rates to be charged as a maximum, and a fortiori rates that shall not be discriminatory.

Act of June 29, 1906, c. 3591, Sec. 4. 34 Stat. L., 589. Missouri K. & T. R. Co. vs. Interstate Commerce Commission, 164 Fed. R., 645. While, therefore, the Commission might not reduce the rates complained of to figures which were so low as to amount to confiscation of the carrier's property, or which were unjustly discriminatory against persons and localities, yet if it found that these rates were unreasonably high, and also found that they were unjustly discriminatory against the complainants and the Atlantic seaboard cities and in favor of Chicago and St. Louis, it was its duty and it had the power to reduce them, so that they would be reasonable, and to reduce them in such a way that undue or unjust discrimination would be avoided.

This was the power claimed by the Commission, and the power which it exercised, rather than a power to create artificial zones.

After considering many rates, including those in question, and overruling the complainants' contentions that they were entitled to as low rates as those given Milwaukee and St. Paul (Record, p. 30), and that the railroads west of the Mississippi should charge no higher rate per ton mile than those east (Record, p. 31); and after finding that a change in the local rates east of the Mississippi River, even if warranted would not cure the discrimination complained of (Record, p. 31), the Commission found two questions remaining, to wit:

"Are these rates [a 60-cent scale between the rivers] as so used, and the through rates resulting therefrom, unwarrantably high and unduly discriminatory or unjustly prejudicial?" and

"Can they be changed without doing injustice elsewhere?" (Record, p. 32.)

It then found that the existing rates gave St. Louis shippers an undue advantage over the shippers in the Missouri River cities (Record, p. 32), but that to reduce the local

rates between the rivers would not cure the discrimination (Record, p. 32); and that the through rates from the seaboard to the Missouri River were unreasonably high, because those portions which applied between the Mississippi River crossings and the Missouri River cities were too high (Record, p. 33).

Accordingly the Commission ruled that it would reduce the through rates by reducing those portions which applied between the rivers (Record, p. 34).

This summary of the Commission's opinion, which is believed accurate, shows conclusively that the two sentences quoted by the Circuit Court from the Commission's opinion (171 Fed. R., p. 684; Record, p. 1057) were in reality findings by the Commission that to reduce the local rates from the seaboard to the Mississippi River or from the Mississippi River to the Missouri River would not cure the unjust discrimination which was caused by the existing through rates.*

Consequently, taking the Commission's opinion as a whole, it is submitted that the Commission did not attempt arbitrarily to create an artificial zone tributary to a given trade or manufacturing center, but plainly found that the rates complained of were unduly and unjustly discriminatory against the complainants and the Atlantic seaboard cities besides being unreasonably high; that to reduce the rates from the Seaboard to the Mississippi River or the

^{*}The two sentences follow:

[&]quot;If the local rates between the Mississippi and Missouri rivers were reduced it would give the same degree of advantage to all the producing and distributing centers on and east of the Missouri River, and their relative advantages and disadvantages would not be changed."

(14 I. C. C. Rep., 312, Record, p. 32)

[&]quot;It seems patent that any change in the rates east of the Mississippi River, even if warranted, would fail to accomplish what the complainants desire, because whatever advantage accrued therefrom to Missouri River cities would accrue to a like degree or extent to their principal competitive commercial centers." (14 I. C. C. Rep., 311, Record, p. 31.)

local rates between the rivers would not affect the discrimination though it would cure the excessive rate. Therefore, to gain both results, to wit, a reasonable rate which did not discriminate, they ordered the through rates reduced by reducing those parts thereof in force between the rivers. This was of course a finding that the rates ordered were reasonable and free from undue and unjust discrimination.

Chicago, etc., Ry Co. vs. Interstate Commerce Com., 171 Fed. R., 680, 689. (Dissenting opinion of Baker, C. J.) (Record, p. 1062.)

2. The Rates Ordered by the Commission Are Not Unreasonably Low.

(a) General Legal Principles.

If, as claimed by the railroads, this proceeding, instituted in the Circuit Court by them, was an original action (independent of the proceedings before the Commission) where the questions at issue were to be tried de novo (Missouri R. & T. R. Co. vs. Interstate Commerce Com., 164 Fed. R., 645, 649), the findings of the Commission were at least prima facie evidence of the matters therein stated.

Illinois Central, etc., R. R., vs. Interstate Commerce Com., 206 U. S. 441, 454.

Missouri K. & T. R. Co. vs. Interstate Commerce Com., 164 Fed. R., 645.

Tift vs. Southern Ry. Co., 138 Fed. R., 753; 148 Fed. R., 1021.

Interstate Commerce Com. vs. Alabama, etc., R. R., 168 U. S., 144.

Act of March 2, 1889, c. 382, Sec. 4, 25 Stat. L., 859.

Hence the fact that the Commission had found that the existing rates were unreasonably high and had reduced them, was *prima facie* evidence in the Circuit Court that the existing rates were unreasonably high, and the reduced rates were reasonable.

And as the burden of proving that the reduced rates were unreasonably low was on the appellees, the appellees were obliged not only to rebut this presumption, but to prove by a fair preponderance of the evidence that the reduced rates were unreasonably low.

Minn. & St. L. Ry. Co. vs. Minnesota, 186 U. S., 257, 264-7.

Missouri, etc., Ry. Co. vs. Interstate Commerce Com., 171 Fed. R., 645, 650.

Interstate Commerce Commission vs. Louisville, etc., R. R., 73 Fed., 409.

Denady, etc., Co. vs. Manchester, etc., Ry., 11 App. Cas., 97.

Far from doing this, all of the evidence which the appellees introduced tended to show not only how unreasonably high the existing rates were, but that the reduced rates are still so high as even to justify a charge that they are unreasonable.

(b) The Through Rates Ordered by the Commission Are Not Unreasonably Low.

Taking the first-class rates as the criterion to avoid confusion by the use of too many figures, it appeared in evidence that the proportions between Chicago and Kansas City were as follows, on the following through traffic:

Chicago to El Paso, 47.1 cents (Record, pp. 30, 1012). Chicago to Oklahoma City, 48 cents (Record, pp. 30, 1012).

Chicago to Texas Common Points, 47.1 cents (Record, pp. 30, 1018).

Atlantic Ocean to Pacific Ocean, 33 cents (Record, pp. 31, 1011).

It also appeared that the carriers received a profit even from the 33-cent proportion (Record, p. 31; Evidence of J. M. Johnson, Record, pp. 163, 168). That part of the first-class rate complained of which applied between Chicago and Kansas City was 74.7 cents (Record, p. 1009). It is plain, therefore, that if the 33-cent proportion gave a profit, the 74.7-cent proportion included in the rate complained of was very excessive. It needs no argument to show that on this comparison the 74.7-cent proportion was unreason-

ably high.

The distances from New York to Kansas City via Chicago, and from Chicago to El Paso via Kansas City, are practically the same (Record, p. 30), and the route that freight takes from Chicago to Kansas City on the New York to Kansas City trip, is identically the same route which freight takes from Chicago to Kansas City on the Chicago-El Paso trip, and yet the proportion for the haul from Chicago to Kansas City in the former case (to wit, the rate complained of) is 74.7 cents, while the proportion for identically the same service in the latter case is, as shown above. 47.1 cents. Plainly, if the latter proportion is reasonable, and insures the carrier a profit, the former is unreasonably high.

A rate is unreasonably low if it does not permit a carrier a return above the cost of carrying the freight for which the rate is charged. If a 33-cent or 47-cent rate permits the carrier a profit, surely a 65.7-cent rate (which is the proportion from Chicago to Kansas City of the through rate reduced by the Commission*) for identically the same service is not unreasonably low.

^{*}I. e., 51 cents from Kansas City of Mississippi R. (Record, p. 34) plus 14.7 cents Chicago to Mississippi R. (Record, p. 27).

(c) A Long Haul Costs a Carrier Less Per Ton Mile Than a Short Haul.

It is argued by the appellees that there is no reason why the through rate from the Seaboard to the Missouri River should not break on the Mississippi River, i. e., why the through rate should not be the same as the sum of the rates from the Seaboard to the Mississippi and from the Mississippi to the Missouri. As the Commission has ruled that the through rate should be less, and should not break on the Mississippi, the burden of proof is on the appellees to show why it should not be less, and why it should break on the Mississippi, and yet the evidence introduced by them on this issue tends to prove the correctness of the Commission's ruling, and how untenable the contention of the appellee is.

Thus the railroad men called by the appellees stated that as a rule carriers receive less per ton mile on a long haul than on a short haul (Record, pp. 166, 194, 385, 462), and that a joint through rate is usually lower than the sum of the local rates. (See Record, pp. 193, 234, 445). The reason for this is a difference in cost of service. Mr. E. B. Boyd, of the Gould lines, testified that the terminal charge is the greater part of the cost of taking traffic originating at Chicago and hauling it 15 miles, and that when that terminal charge is projected over five hundred miles, it makes a less rate per ton mile than on a shorter haul. (Record, p. 463.)

The terminal charges are, of course, the same for all freight of the same character, whatever the distance hauled, and it is too plain to need argument that when this charge is spread out over a long haul, it always makes the proportion per ton mile less than on the short haul.

In early times, through rates used to break at Buffalo, Pittsburg, Cincinnati, etc., just as the rate in question now breaks at the Mississippi River; but this has all been changed (Record, pp. 442-3), though the conditions which obtain now are no different than when these places were breaking points (Record, p. 449).

The time for doing away with the breaking of the rates at the Mississippi River has come now, just as it long ago came to other places east.

(d) A Difference in Classification Is No Reason For Refusing Through Class Rates.

The principal reason advanced why the rates should continue to break on the Mississippi River is the fact that the classification of freight obtaining to the east of the river is different from that obtaining to the west. (Record, J. M. Johnson, p. 158; Boyd, p. 446.)

It is admitted that this difference in classification creates an undesirable state of affairs. It is apparent, however, that if the proportional rate between the rivers is too high as the Commission found, the order of the Commission ameliorates this condition rather than makes it worse. It is a strange argument which contends that an order which makes an undesirable thing better is unjust and unreasonable, because the state of affairs which it makes better is undesirable.

Many of the commodities have the same ratings in the different classifications, and the classifications are each year approaching a point where they will be uniform (Record, pp. 449-50). The fact that the Ohio River is a breaking point does not prevent the rate from Chicago to Atlanta from being a through rate, less than the sum of the locals (Record, p. 444), although the classification on opposite sides of the Ohio River is different.

It would seem that there was more reason for having the Atlantic seaboard a breaking point for goods imported from foreign countries than for having the Mississippi River a breaking point for United States traffic, yet it frequently happens that the import rates on foreign goods are much less by gulf ports to the Missouri River than by New York (A. G. Jones, p. 391); or, in other words, there are through rates from Europe, both via the Atlantic seaboard, and the Gulf, that are lower than the sum of the rates from Europe to New York or the Gulf, and from New York or the Gulf to the Missouri River.

(See Texas Pacific Ry. Co. vs. Interstate Commerce Com., 162 U. S., 197.)

(e) Conclusions.

It is submitted, therefore, that there was no evidence before the Circuit Court to show that the rates ordered by the Commission are unreasonably low, but that, on the other hand, all the evidence shows they are, if anything, still unreasonably high, and there is no valid reason why on the ground of unreasonableness *per se* the orders should be enjoined.

3. The Rates Ordered by the Commission Are Not Unduly or Unjustly Discriminatory.

(a) General Legal Principles.

The appellees do not contend that the rates ordered by the Commission discriminate against them, but that they do discriminate unduly and unjustly against shippers at St. Louis, Chicago, etc. (Bill of Complaint, Record, p. 11). It is believed the railroads may not lawfully use this alleged discrimination as a pretext for their refusal to comply with the Commission's order, but it does not seem necessary to argue the question, as they have not shown discrimination on the facts.

Whether or not the rates are unjustly discriminatory, is a question of fact.

Texas and Pacific Ry. Co. vs. Interstate Commerce Com., 162 U. S., 197, 219, 20.

East Tenn., etc., Ry. Co. vs. Interstate Commerce Com., 181 U. S., 1, 28.

Just as the burden of proving that the rates ordered by the Commission were unreasonably low was on the appellees, so there also rested upon them the burden of proving by a fair preponderance of the evidence that the rates so ordered were unjustly or unduly discriminatory; and there was the same presumption in favor of the Commission's order that there was on the question of the reasonableness of the order.

It is not sufficient to show mere discrimination. To be illegal under the Interstate Commerce Act, discrimination must be undue or unjust.

Interstate Commerce Com. vs. B. & O. R. R. Co., 145 U. S., 263.

Texas Pacific R. R. Co. vs. Interstate Commerce Com., 162 U. S., 197; 219, 20.

And the fact that the rate charged a local shipper for transporting property between two points is more than the proportion (applying between the same points) of a joint through rate, does not support an allegation of undue preference or discrimination against the local shipper.

Parsons vs. Chicago & N. W. Ry. Co., 63 Fed., 903 (C. C. A.).

Minneapolis, etc., Ry. Co. vs. Minnesota, 186 U. S 257.

Consequently, the appellees do not prove their case merely by showing the fact that as a result of the Commission's order the local rates between the rivers are 9 cents more first-class and 7, 5; 4 and 3 cents more, respectively, in the other classes, than the proportions of the through class rates applying between the rivers on through freight from the seaboard to the Missouri River.

Indeed, in order to entitle them to an injunction, the appellee railroads must prove that the order of the Commission showed an exertion of authority, which was in form within its power but which was manifested in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power; that the order was more than merely inexpedient or unwise.

Interstate Commerce Com. vs. Illinois Cent. R. R., U. S. Sup. Ct., Jan. 10, 1910. Advance sheet, pp. 8, 9.

(b) There Is No Evidence That the Reduced Rates Are in Fact Unduly Discriminatory.

The appellees' contention, if it is to prevail, must be supported by evidence; and yet the evidence offered utterly fails to show any undue or unjust discrimination.

It may be described as statements of glittering generalities, unsupported by facts or figures, or as guesswork or prophecy, not based on any substantial premises.

Thus J. M. Johnson (Record, p. 162) stated, generally, that if the Commission's order were to go into effect, the commercial development of St. Louis would be retarded, because the eastern merchants would gain an advantage from the reduced rate. Jackson Johnson, a jobber at St Louis, stated that the result of the Commission's order would be an indirect disadvantage to his house (Record, p. 323). Mr. Jackson Johnson, however, admitted on cross-examination that in the case of his house, the disadvantage amounted to but \$4,500 on profits of \$722,000, or six-tentis of one per cent (Record, p. 326). Surely, in this instance

the effect of the Commission's order is a nominal reduction in excessive profits, rather than undue or unjust discrimination.

If these witnesses' contention is sound, the through rate from New York to St. Louis, which is less than the sum of the local rates—New York to Buffalo and Buffalo to St. Louis—(Record, p. 479) is unjustly discriminatory against a Buffalo jobber selling New York goods in St Louis, because it costs the New York man less per mile to get the goods to St. Louis than it costs the Buffalo man. And it is the same in any case where the through rate is less than the sum of the locals.

But the contention is not sound. These gentlemen undoubtedly meant the Court to infer that a St. Louis whole-saler selling seaboard goods in Omaha (to make use of the same example used supra, page 6) would under the Commission's order be obliged to pay 9 cents more a hundred pounds first-class than the Boston wholesaler to get the same goods to Omaha. But this is not the way it works out in practice, as the very important item of the cost to the Boston wholesaler of having the goods carried to Boston from the factory is left out of consideration. There is almost always a transportation charge from the factory to the wholesalers' warehouse, and the wholesalers in Atlantic seaboard cities have to pay this charge, in addition to the same through freight from the seaboard territory to the Missouri River cities, as that paid by the St. Louis wholesaler.

It is impossible, therefore, for a through rate, which, like those in question is a combination of the locals on a particular point, to operate in any other way than grossly in favor of the place which is the breaking point. Naturally the only way to cure such discrimination is by making the through rate from Boston to Omaha (that is, from the Atlantic seaboard territory to the Missouri River cities) less than the combination on St. Louis (or speaking generally, the Mis-

sissippi River crossings); in other words, to do away with St. Louis and the other Mississippi River crossings as breaking points for the through rate. If (to make use again of the example used above, page 6) it is proper for the railroads to make the through rate from Gardner, Maine, to St. Louis less than the combination on Boston or New York it cannot be improper for the Commission to make the through rate from Boston or New York to Omaha less than the combination on St. Louis.

This is what the Commission did, and properly did, for the evidence shows how unjustly the seaboard and Missouri River wholesalers are discriminated against in favor of the Mississippi River crossings under existing rates, rather than unjust and undue discrimination against the Mississippi River crossings under the rates ordered by the Commission.

Crosby, a railroad man (Record, p. 193) stated generally that the effect of the Commission's order would be to transfer business originating on the Atlantic seaboard to the seaboard, because St. Louis business had been built up on the system of rates breaking at the Mississippi. And yet he admitted that before the practice of rebating was discontinued, his railroad used to rebate "perhaps ten per cent" of the rate charged Atlantic seaboard shippers on freight destined for the Missouri River, so that St. Louis was actually built up in spite of the existence of lower through rates from the seaboard than those ordered by the Commission (Record, p. 200). Boyd testified (Record, pp. 442, 3) that the discontinuance of the practice of breaking rates at Cincinnati, Pittsburg, and Buffalo had not prevented these cities from prospering.

It is submitted that the above is a fair summary of the effect of the testimony of these witnesses. There was, indeed, other testimony from jobbers and shippers, but it was of even less probative force than that summarized above. It may all be characterized as statements of general proposi-

tions made either by persons who knew nothing of the actual effect the Commission's order would have on their business (as Evans, p. 254; A. G. Jones, p. 384; Simmons, p. 306), or by persons who knew nothing about rates (like Haux-

hurst, p. 352, 7).

Clearly there is hardly any evidence which tends to show that the rates ordered by the Commission are discriminatory: certainly there is none which shows they are unduly or unjustly discriminatory, and sustains the burden of proof, and rebuts the presumption in favor of the reasonableness of the rates ordered.

(c) There Is No Evidence That the Proportionate Cost of Carrying Through Freight Is More Than or as Much as the Cost of Carrying Local Freight.

Other things being equal one rate may be discriminatory when compared with another if there is no difference between the cost to the carrier of the service for which each rate is exacted: i. c., if there is not a difference in the cost of service, a rate may be discriminatory.

The burden of proving that there was not a difference in cost of service which justified the Commission in ordering the proportionate part of the through rates, applying between the rivers, to be less than the local rates between the rivers, was on the appellees. They failed to sustain it.

They attempted to show that when through freight was handled by more than one carrier at Chicago the cost of handling was greater than the cost of handling local freight (Record, pp. 125, 140); but the evidence did not support the proposition for the following reasons:

1st. This handling charge at the freight house is a terminal charge (Record, p. 153), and is the same whatever the destination of the freight (Record, p. 132, 134); it, therefore, results in a less expense per ton mile on a long through haul than on a short local haul.

2d. There is no handling charge on carload lots which comprise a large part of the through traffic from the Atlantic seaboard to the Missouri River cities (Record, pp. 132, 149, 150).

3d. There is no handling charge on several less than carload lots in one car consigned to a number of different merchants in a Missouri River city (Record, p. 150).

4th. This extra terminal charge applies only at Chicago. and there only to less than carload lots which have to be broken for delivery to connecting carriers (Record, p. 133), and it is greater than the expense of handling local freight only when the through freight comes to the freight house by car (Record, p. 125). Thus by comparing in this single instance the cost of handling seaboard freight passing through Chicago to a Missouri River city with freight originating at Chicago and destined to a Missouri River city. the appellees argue that the cost of serving local freight is less than that of serving through freight. Generally speaking, it is not fair in applying the test of a difference in cost of service to compare the cost of a local haul with the cost of the equivalent part of a through haul; the comparison should be made between the cost of the through haul and the cost of at least two of the short hauls which make up the through haul. Such a comparison on this state of facts shows that the handling costs are less on the through freight than on freight in and out of Chicago; for on less than carload freight delivered to a connecting carrier at Chicago there is but one handling expense, whereas on local freight consigned from the seaboard to a Chicago merchant and by him reshipped to the Missouri River, the railroads have two handling expenses, unloading and reloading.

In all the cases, therefore, an analysis of the evidence shows that the cost of serving through freight is less than that of local. It was alleged that Chicago and St. Louis were unjustly discriminated against by the Commission's order. The local rate, Chicago to Omaha, is 80 cents first-class (Record, p. 32). The proportion of the through rate from Atlantic seaboard for the same haul as reduced by the Commission is 65.7 cents (supra, p. 15). The local rate, St. Louis to Omaha, is 60 cents first-class (Record, p. 26). The proportion of the through rate from the Atlantic seaboard for the same haul, as reduced by the Commission, is 51 cents (Record, p. 34). There is no evidence on behalf of the appellees to sustain the burden of proof showing that it does not cost 14 cents and 9 cents less, respectively, to carry through freight from Chicago to Omaha and from St. Louis to Omaha, than local freight.

(i) If the Local Rates Are Too High and so Unjust When Compared With the Proportion of the Through Rates as Reduced, the Local Rates May Be Reduced on a Proper Complaint.

Supposing, however, for the sake of argument, that the Commission's order, by leaving in effect some high rates not complained against, will work a kind of injustice, nevertheless this fact is no reason why the Commission's order should not be enforced. If certain rates are high, they are unreasonable. The fact that the operation of a reasonable rate is discriminatory when compared with an unreasonably high rate cannot, when the limited powers of the Commission are taken into account, be considered a valid reason why the reasonable rates should not be enforced.

Before the Hepburn Act, the Commission could not make rates.

Interstate Commerce Com. vs. Cincinnati, etc., Ry. Co., 167 U. S., 479.

The Hepburn Act gave the Commission power "after full hearing upon complaint made as provided in Section 13 of this act, or upon complaint of any common carrier * * *
to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be thereafter observed as the maximum to be charged. * * *"

Act of June 29, 1906, c. 3591, Section 4. 34 Stat. L., 589.

The Commission would not have had the power in this proceeding to reduce the local rates from Chicago to Kansas City or from St. Louis or Cincinnati to Kansas City, for example, even if high, as complaint had not been made against them. It is always open to the Chicago, St. Louis and Cincinnati hippers and jobbers, or to anyone who feels he is discriminated against by the order of the Commission to complain of the local rates on the ground that they are unreasonably high, and if such persons should prove their case, they are entitled to a reduction.

Kindel vs. N. Y., N. H. & H. R. R. Co., 15 I. C. C. Rep., 555.

Spokane vs. Northern Pacific R. R. Co., 15 I. C. C. Rep., 376.

It does not follow that because the Commission cannot on its own initiative reduce and fix the local rates between the rivers, it cannot reduce and fix the corresponding proportions of the through rates on a proper complaint; for otherwise the Commission would never have power to fix a particular rate complained of unless the whole rate structure or all the rates which could possibly be affected by a change were complained of at the same time.

In other words, while the power of the Commission to fix rates is a legislative one it is not a true legislative power in the sense that the Commission can act on the entire subject-matter, but like the power of a Court, it is a power to act only when the matter is brought before it by proper pleadings.

A Court would not refuse to hold the wholesale rate of a public-service company unreasonably high because the retail rate was also high, and to do so would unjustly discriminate against the retailer. It would enjoin the unreasonable wholesale rate, and when the retail rate was properly brought before it, would enjoin that.

The through rates being charged for services separable and separate from the local rates must stand or fall upon their merits irrespective of whether the local rates are in themselves just and reasonable. If they are not just or reasonable appropriate proceedings should be instituted to make them so.

Stickney vs. Interstate Commerce Com., 164 Fed. R., 638, 644.

If the Commission's order is permitted to stand, it is almost certain that the railroads will reduce any other rates affected if they are unduly or unjustly discriminatory, or that the Commission will do so when the question is properly brought before it.

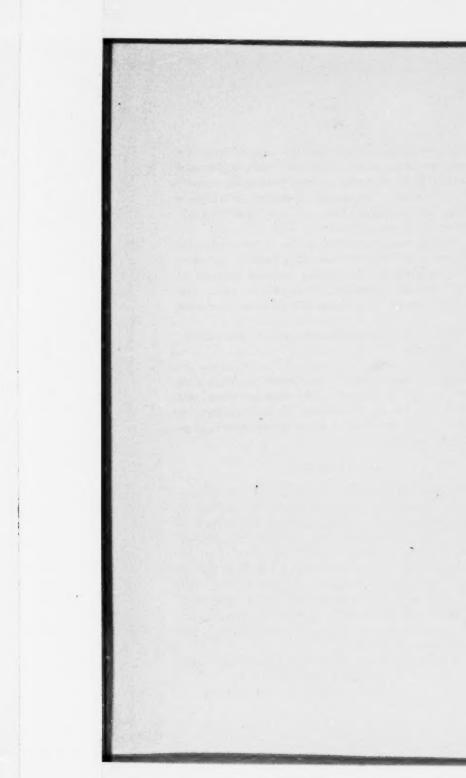
CONCLUSIONS.

It is respectfully submitted, therefore, for the reasons shown that the majority of the learned Circuit Court erred in ruling that the order of the Commission was beyond its legal power, and that being within its power the evidence introduced by the appellees in the Circuit Court is, to use the language of the Court in Missouri, K. & T. R. Co. vs. Interstate Commerce Commission, 164 Fed. R., 645, 650. "clearly wanting in that certainty, fullness and persuasive force which ought to be and is essential to overcome the force of the Commission's finding or determination upon which the order" was based.

The injunction should be dissolved and the bill dismissed.

EVERETT W. BURDETT.

FREDERICK MANLEY IVES.



FILED

In the

MAR 9 1910 JAMES H, MCKENNEY.

Supreme Court of the United States

Term, A. D. 1910.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

VB.

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

No. 663.

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY ET AL,

Appellants,

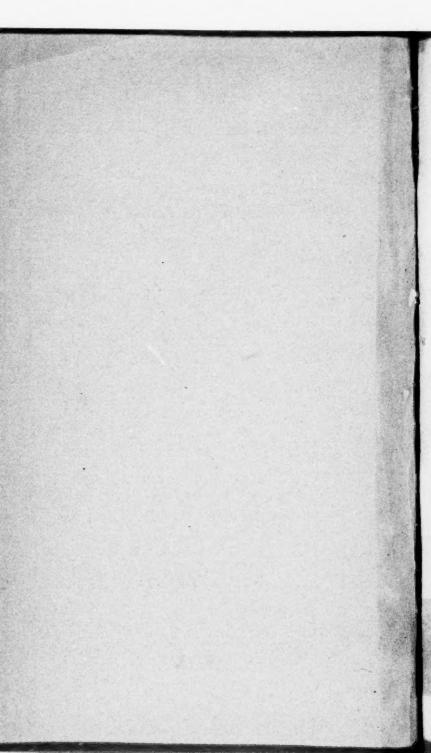
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

No. 664.

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR INTERVENING APPELLANTS. STATEMENT.

JOHN H. ATWOOD,
GEORGE T. BELL,
JOHN L. WEBSTER,
Solicitors for Intervening Appellants.



In the

Supreme Court of the United States

Term, A. D. 1910.

THE INTERSTATE COMMERCE COMMISSION, Appellant, vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

No. 663.

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY ET AL,

Appellants,

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

No. 664.

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

1. The Appeal.

This appeal (Rec., 1076) seeks to reverse a decree (Rec., 1068, — Fed. Rep. —) of the Circuit Court of Appeals for the Seventh Circuit, sitting as the Circuit Court for the Northern District of Illinois, Eastern Division, perpetually enjoining appel-

lant from enforcing a certain order by it promulgated in pursuance of a complaint filed by intervening appellants against appellees.

2. The Case.

(A) Proceedings Before Appellant.

- 1. In February, 1907, the intervening appellants herein, Burnham-Hanna-Munger Dry Goods Company, a corporation, and other merchants in the cities of Kansas City and St. Joseph, Mo., and Omaha, Neb., all upon the Missouri river, hereinafter referred to as the Missouri river merchants, filed a complaint (Rec., 14-21) with appellant, the Interstate Commerce Commission, hereinafter referred to as the Commission, against appellees, the Chicago, Rock Island & Pacific Railway Company, and four other railways operating from Chicago and Mississippi river crossings to the Missouri river cities, complaining of the then prevailing freight rates from New York and other Atlantic seaboard cities to said Missouri river cities.
- 2. The complaint of the Missouri river merchants attacked the following freight rates then in effect on traffic transported from New York (other Atlantic seaboard cities need not be mentioned, as they all take certain differentials over or under the New York rates) to these Missouri river cities.

Rates in cents per hundred pounds:

| | C | lasses. | | |
|-----|-----|---------|----|----|
| 1 | 2 | 3 | 4 | 5 |
| _ | _ | _ | - | |
| 147 | 120 | 93 | 68 | 57 |

The complaint stated (Rec., 17-18) that the above rates were made up by adding to the following rates then applicable from New York to Mississippi river crossings:

| 1 | 2 | 3 | 4 | 5 | |
|----|----|----|----|----|--|
| _ | - | _ | _ | _ | |
| 87 | 75 | 58 | 41 | 35 | |

these rates in effect from Mississippi river crossings to said Missouri river cities:

| 1 | 2 | 3 | 4 | 5 |
|----|----|----|----|----|
| _ | - | - | _ | _ |
| 60 | 45 | 35 | 27 | 22 |

The complaint further stated (Rec., 18) that the above New York-Missouri river rates were observed by the defendant lines on traffic moving via Chicago. These through rates were attacked on two grounds, as follows:

First: On the ground that they were excessive and therefore in violation of Section 1 of the Interstate Commerce Act, because the portions or divisions charged by the lines west of the Mississippi river and Chicago were excessive; and

Secondly: On the ground that they (being so much higher than the rates applicable from New York to St. Paul and Minneapolis) subjected the Missouri river cities and merchants to undue and unreasonable prejudice and disadvantage in violation of Sections 2 and 3 of the same act.

It must be borne in mind that no complaint was directed against the *local* Chicago-Missouri river or Mississippi river-Missouri river rates as *local rates*, but against said rates as parts of the through New York-Missouri river rates. This fact is clearly shown

from the following excerpt (Rec., 20) from the prayer of the complaint:

- 66. these complainants pray that defendants be required to answer the charges herein and that an order be made commanding de-* * * to wholly desist fendants from charging * * said \$1.47, \$1.20, \$.93, * \$.68 and \$.57 per hundred pounds said through rates from the Atlantic seaboard to the said cities of Kansas City, St. Joseph and Omaha, and forbidding said defendants * from charging * * * as their proportions of said through rates on business moving via Chicago to Kansas City, St. Joseph and Omaha * * * per hundred pounds and via Mississippi river 60c * * pounds * * *." per hundred pounds
- 3. The defendant lines filed their answers (Rec., 799-994), in which they denied the allegation that the rates were excessive, and, to the allegation that they subjected Missouri river cities to undue and unreasonable prejudice and disadvantage in favor of St. Paul and Minneapolis, averred that the lower rates made to the latter cities were compelled by Canadian and water competition via the Great Lakes.
- 4. On motion (Rec., 995) of the Chicago & Northwestern Railway Company, one of the defendants, the Commission made parties all of the railways and steamship lines operating from New York and other north Atlantic seaboard cities to Chicago, Mississippi river and St. Paul and Minneapolis. Representatives of the commercial associations of St. Paul, Minneapolis, Chicago, St. Louis and Sioux City were also permitted to intervene. No one was denied permission to intervene before the entering of the order hereinafter referred to.

5. Thereafter hearings were had at Kansas City and Chicago, and a great deal of testimony taken (Rec., 721-978). On June 24, 1908, the Commission handed down its decision (Rec., 21-34), finding substantially as follows:

First: That the New York-Missouri river rates charged by the defendants were excessive because, and solely because, the Mississippi river-Missouri river portions of them were excessive. The Commission (Rec., 33-34), upon this point, said:

"As has been stated, the through rates from Atlantic seaboard territory to the Missouri river cities are made by adding together the rates from points of origin to the Mississippi river crossings * * * and the local class rates from the Mississippi river crossings to the Missouri river cities. The through rates so established are, in our opinion, unreasonably high. This is so because those portions of the through rates which apply between the Mississippi river crossings and the Missouri river cities are too high. These are defendants' 'separately established rates,' which are 'applied to the through transportation,' and therefore the through rates should be adjusted by reduction of those factors, or parts thereof, which are found to be unreasonable."

Secondly: That the low rates to St. Paul and Minneapolis were actually compelled by water competition via the Great Lakes and rail competition via Canada, and that therefore the disadvantage to which the Missouri river cities and merchants were subjected on that account was not unlawful, as being not unreasonable or undue, the opinion, upon this feature of the case, reading (Rec., 30):

"The controlling influence of the water and Canadian competition over rates from the seaboard to the twin cities is apparent, and it is also apparent that the defendant carriers west of Chicago must meet the force of that competition or refrain from participation in that business."

And (Rec., 33):

"We cannot agree with the argument that the rates from the Atlantic seaboard * * * to the Missouri river cities should be the same as, or lower than, rates from same points to the twin cities. As has been seen, the rates to the twin cities can not escape the influence of the water and Canadian competition."

Thus it is seen that as to the first ground of complaint, complainants were sustained, but as to the second ground they were not sustained.

The Commission thereupon entered an order against the five original defendants (lines operating west of the Mississippi river) commanding them "to cease and desist * * * from charging * * * between the Mississippi river crossings * * * and the Missouri river cities"

| 1 | 2 | 3 | 4 | 5 |
|----|----|----|----|----|
| _ | _ | _ | - | _ |
| 60 | 45 | 35 | 27 | 22 |

"as parts of the through class rates on through shipments originating at the Atlantic seaboard points * * * to the said Missouri river cities," and in lieu thereof to put in force,

| 1 | 2 | 3 | 4 | 5 |
|----|----|----|----|----|
| _ | _ | _ | | |
| 51 | 38 | 30 | 23 | 19 |

The railroads and steamship lines operating east of the Mississippi river were dismissed.

7. After the above order was entered, but be-

fore it became effective, certain other railways operating between the Mississippi and Missouri rivers, not parties to the proceedings before the Commission, presented a petition asking permission to intervene. This petition was denied.

(B) Proceedings Before the Circuit Court.

1. The five original defendants before the Commission, on October 7, 1908, filed their bill (Rec., 2-13) in the Circuit Court of the United States for Northern District of Illinois, Eastern Division, praying that the Commission be enjoined from enforcing the order above mentioned. Two grounds for injunction were attempted to be alleged:

First: That the rates ordered by the Commission were confiscatory. The only allegation, however, in the bill looking to this ground was (Rec., 8):

"* * that the said order compels your orators to accept for the transportation of property as aforesaid rates and charges which are not reasonable and fair returns for the services so rendered by your orators."

Secondly: That the order was in excess of the powers of the Commission because it (as alleged, Rec., 11) "misapplies the law and compels your orators to serve a certain class of people, to-wit, the shippers at the Atlantic seaboard, at an unreasonably low rate * * and at a rate lower than is charged shippers at Chicago and St. Louis." The theory of the bill being, apparently, that this was the same as compelling an undue and unreasonable discrimination, which, being prohibited by the statute, is beyond the power of the Commission.

2. Simultaneously with the filing of the above

bill, the other railways operating from Chicago and Mississippi river to the Missouri river cities, heretofore referred to as having presented petitions to intervene in the case before the Commission, filed their intervening petition (Rec., 76-87), in which they substantially adopted the allegations of the bill.

- 3. In due time the Commission filed its answers (Rec., 47-69, 111-114) to the bill and intervening petition, in which it denied that the proposed rates were unreasonably low or that they in effect compelled the railways to unjustly discriminate against Chicago and St. Louis shippers in favor of Atlantic seaboard and Missouri river shippers. On the contrary, the Commission averred that it reduced only the Mississippi river-Missouri river rates on through Atlantic seaboard traffic, because (no complaint having been filed against said rates as local rates) it had no jurisdiction of said rates as local rates, and therefore could make no order with respect to them.
- 4. The matter was argued before Circuit Judges Grosscup, Seaman and Baker on the application for a temporary injunction, and it appearing advisable to hold the rates in *status quo*, an interlocutory decree (Rec., 73-75) was granted on November 6, 1908. The motion of the other railways to become parties was also granted.
- 5. On December 1, 1908, the complainants in the case before the Commission (intervening appelants herein) were permitted to intervene, which they did, and substantially adopted the answer of the Commission.
- 6. Thereafter a special examiner was appointed to take testimony. Hearings were had in Chicago, St. Louis, Omaha, St. Joseph, New York and Boston.

Evidence was (Rec., 121-470) adduced by the railways with a view of showing that if the proposed rates were allowed to be put in force, shippers located in St. Louis, Chicago and cities in what is known as Central Freight Association territory (territory east of the Mississippi river and west of Pittsburg and Buffalo) would be placed at a disadvantage in competing with Atlantic seaboard shippers in the sale of goods at points on and west of the Missouri river. The only evidence introduced that tended to show that the proposed rates were unreasonably low and confiscatory was a statement (Rec., 440) of the witness Boyd that the rates would result in reducing the revenues of the railways \$140,-000.00 per annum. Absolutely no showing was made that there would not be still remaining sufficient revenue to pay the cost of operation and maintenance and a fair return upon the capital invested in the properties. So that this ground of complaint on the part of the railways may be treated as abandoned.

7. The matter was then briefed and argued orally by counsel representing all parties before Circuit Judges Grosscup, Baker and Kohlsaat, and a decision (Rec., 1053-1067) was handed down by Judge Grosscup (Judge Kohlsaat concurring and Judge Baker dissenting) granting the permanent injunction and sustaining the contention of the railways that the effect and purpose of the proposed rates was to unjustly discriminate in favor of Atlantic seaboard shippers and to substitute in place of the "base line" or "combination" system of making rates a new and artificial system called a "zone" system, all of which was held to be beyond the powers of the Commission. The court gave four reasons for so holding:

- (a) Certain expressions of the Commission in its opinion which to the court indicated that it was intended to discriminate against shippers located in cities on and east of the Mississippi river and west of Buffalo and Pittsburg.
- (b) The fact that the Commission made no inquiry of the reasonableness or unreasonableness of Mississippi river-Missouri river local rates.
- (c) The fact that the Commission had since its decision made no disavowal of this intended effect and purpose.
- (d) What the court call the "differentials themselves," meaning thereby the difference between the old rate of 60 cents, first class, for example, and 51 cents, the proposed rate, or 9 cents, as a differential, in favor of the Atlantic seaboard and Missouri river shippers.

(C) Appeal Here.

From the decision of the Circuit Court an appeal (Rec., —) was allowed to this Court.

ARGUMENT.

I.

The order itself was lawful and proper.

The Commission had before it for consideration the through rates from New York to the Missouri river cities. These rates as pointed out are made by combining the "separately established" rates applicable from New York to Mississippi river crossings and the "separately established" rates from Mississippi river crossings to these Missouri river cities. The through rates and these two factors or portions are presumed to be reasonable and just rates until proven otherwise. When the hearings on the complaint came on no evidence was presented with a view of proving or attempting to prove the unreasonableness of the factor or portion from New York to the Mississippi river crossings. dence was confined absolutely to the factor or portion west of the Mississippi river and Chicago, or, in other words, to the factor or portion under the control of the five original defendants. Not a scintilla of testimony was introduced attacking the other factor or portion.

Therefore, the legal presumption that the east of Mississippi river factors or portions are reasonable and just remained unassailed. The Commission, convinced that the through rates (the rates legally before them) were too high, consequently turned its attention to those factors which had been attacked.

And in so doing it simply followed the law. Section 1

of the Act to Regulate Commerce, among other things, says:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful."

The "part(s) thereof" found to be unjust and unreasonable were the factors or portions exacted by the Western lines from Mississippi river crossings to the Missouri river cities. Having so found, the Commission had no alternative but to order them reduced. Section 15 of the act provides:

"That the Commission is authorized and empowered, and it shall be its duty wherever, after full hearing upon a complaint, * * * 't shall be of the opinion that any of the rates or charges whatsoever demanded, charged or collected by any common carrier or carriers * * * are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, * * * to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged * * and to make an order that the carrier shall cease and desist from such violation," etc.

In response to this mandate of the act, the Commission "determined" and "prescribed" that 51 cents, first class, instead of 60 cents, "should be observed as the maximum to be charged" from Mississippi river crossing to Missouri river points (the "part" found to be unreasonable) in making up or arriving at through rates from Atlantic seaboard cities to

Missouri river cities (the rates complained of). We state it as a proposition unassailable that under the circumstances the Commission could not possibly have made any other order.

II.

The order itself being lawful and proper for the Commission to make under the pleadings, the Circuit Court erred in looking to the motives and purposes of the Commission expressed (as alleged) in its opinion which is not a part of the order.

- (a) That it was purposed to discriminate against shippers in Central Traffic Association territory is manifest, says the Circuit Court, from the following expressions from the opinion (not the order) of the Commission:
 - " * * that if the local rates between the Mississippi and Missouri rivers were reduced it would give the same degree of advantage to all the producing and distributing centers on and east of the Missouri river, and their relative advantages and disadvantages would not be changed."

And:

"It seems patent that any change in the rates east of the Mississippi river, even if warranted, would fail to accomplish what the complainants desire, because whatever of advantage accrued therefrom to Missouri river cities would accrue to a like degree or extent to their principal competitive commercial centers."

In the first place, the local rates between the

Mississippi and Missouri rivers were not complained of and were not in issue before the Commission, and the rates east of the Mississippi river were not attacked at all. As before stated, no evidence was presented against them. The above observation of the Commission were, therefore, obiter dictum and should not be considered in this case.

(b) Again, it is a fundamental rule of law that a court should not look behind a decree or order for the motives or purposes of the body making it. This has been uniformly held with respect to state legislatures. If a legislative enactment is legal and is not in violation of the Constitution, it is beyond the power of any court to inquire into what was the intention of those who enacted it. (Doyle v. Continental Trust Co., 94 U. S., 535, 541.)

This is a doctrine of peculiar applicability to an order of the Commission. A court should confine its attention to the order of the Commission, not to its written report, opinion or supposed motive or purpose in making it. Neither the defendant carriers nor anyone else is bound by anything said in the opinion. The Commission speaks through its orders. And that Congress intended courts to focus their review on the order is, we think, manifest from several passages in the act itself. For example, Section 15 provides that:

"All orders of the Commission * * *
shall continue in force for such period of time,
not exceeding two years, as shall be prescribed
in the order of the Commission, unless the same
(the order) shall be suspended or modified or set
aside by the Commission or be suspended or set
aside by a court of competent jurisdiction."

And the following from Section 16:

"The venue of suits brought in any of the Circuit Courts of the United States to enjoin, set aside, annul or suspend any order or requirement of the Commission shall be in the district," etc.

In both of these provisions reference is made solely to the orders of the Commission. Nothing is said about the written report or opinion of the Commission in which are given the reasons for the issuing of its orders. It is manifest, therefore, that the question to be decided by the court of review in a case of this kind is: "Is the order a proper one for the Commission to make?" The reasons, motives or purposes of the Commission are not reviewable. Different men will naturally disagree as to the reasons for. or wisdom of, promulgating an order of this kind. In the very recent case (decided January 10, 1910) of Interstate Commerce Commission v. Illinois Central Railroad, docket No. 233, this identical question is raised and decided by this Court. In a learned opinion by Mr. Justice White the matters which should be considered in passing upon an application to set aside an order of the Commission are clearly defined. Among other things, it is said:

[&]quot;Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

The Commission had no jurisdiction to inquire into the reasonableness or unreasonableness of the local rates as such between the Mississippi and Missouri rivers.

- (a) As before pointed out, no complaint was made against the inter-river local rates, and a formal complaint is a condition precedent to the Commission's power to make a formal order relative thereto. This is so clearly manifest from the act itself, and has been held so many times, both by the Commission and the courts, that further discussion is deemed unnecessary.
- (b) Again, these inter-river rates, as local rates, are entirely beyond the power of the Interstate Commerce Commission, even on complaint. These are entirely within the states of Iowa and Missouri, and are, therefore, governed by the Legislatures of those states. In fact, both of these states have promulgated maximum freight rate schedules, and the railways, in their bill (Rec., 9), admit that the rates between St. Louis and Kansas City, for example, are fixed by the Missouri schedule. While the inter-river rates apply from and to cities on both banks of the Mississippi and Missouri rivers, yet the Commission would be loath, and justly so, to interfere with rates so manifestly of a state character, especially after those states have expressed their legislative will by the enactment of maximum rate schedules. This is not the first case where the Commission has refused to interfere with states' rights. In Farmers, Merchants and Shippers Club v. Atchison, Topeka &

Santa Fe Railway et al, 12 I. C. C. Rep., 402, 407, a complaint was made against grain rates from Kansas points to Kansas City, Mo. In refusing to take jurisdiction, the Commission said:

"The elevators in which this grain is handled are to a considerable extent situated at Kansas City, Kas. * * * In substance, therefore, these rates from the field to the Missouri river are entirely within the State of Kansas and entirely within the control of that commonwealth. * * * We are not, of course, legally concluded by the action of the Legislature, but when this state has acted upon a subject which peculiarly concerns it, we ought not interfere with the action taken."

Plainly, the Commission was right in refusing to reduce these inter-river local rates.

IV.

The Commission has disavowed any intention to create "trade zones."

In the twenty-third annual report of the Commission, just recently sent to Congress, the following is said (page —) regarding the opinion of the Circuit Court that the purpose of the Commission was to create "trade zones":

"The court assumed that it was the intention of the Commission to prescribe 'trade zones' which should be tributary to trade centers, and set aside the order upon the ground that no such authority was conferred by the act. As one reason for its holding that it was the purpose of the Commission to establish such zones, the court said:

'Since that time the Commission has spoken in the Denver rate hearing and also in its annual report. In neither has there been a disavowal of the power said to be claimed and the

effect said to be produced.'

In view of this statement of the court the Commission desires to disavow any attempt to create so-called 'trade zones' by the orders referred to. It has repeatedly said that such was not the function either of this Commission or of the railroads of this country; that every locality was entitled, so far as might be, to a reasonable rate and to do whatever business it could upon The Commission further desires to state that, so far as it understands the effect of these orders, they do not in fact create trade zones. The Commission has simply attempted to prescribe reasonable rates between the points It has said that a long-distance rate may properly be less than the sum of the shorter distance rates which make up the longer distance rate. Assuming that 87 cents from New York to St. Louis is reasonable and that 60 cents from St. Louis to Kansas City is reasonable, it does not follow, in the opinion of the Commission, that \$1.47 is a reasonable rate from New York to Kansas City. Assuming that 80 cents from Chicago to Omaha and \$1.25 from Omaha to Denver are reasonable first-class rates, \$2.05 is not of necessity a reasonable first-class rate from Chicago to Denver. The cost of the through service is less, ordinarily, than the combined cost of the two local services. It is, moreover, necessary that for the purpose of uniting the widely separated portions of our country long-distance tariffs should be somewhat less, in proportion to the actual cost of the service, than shorter distance rates.

But it is one thing to say that the through rate may be less and quite another thing to say that it shall be less. This Commission has never yet said that the carriers might not, if they saw fit, reduce the rate from St. Louis to Kansas City on all business to 51 cents, first-class; it has never said that the carriers leading from Chicago to Denver may not reduce their local rates from Chicago to Omaha and from Omaha to Denver by such amount as will equal the through rate established, and until that is said there is no compulsion upon the part of the carrier to change the relations which have formerly existed. We simply require that for these long-distance hauls reasonable rates shall be established. The carrier is free to so reduce its local rates that the combination will equal the through rate if it desires.

While, however, there has been no attempt upon the part of the Commission to obliterate the Missouri river and the Mississippi river as base lines if the carriers desire to make local rates sufficiently low so that the combination of those rates will produce a reasonable through rate, still, it seems proper to say that, as we understand the law, the Commission has jurisdiction to do this if occasion requires. If it should be found that the system of rate making now in force creates undue prejudice in favor of localities upon the Missouri river or the Mississippi river, the Commission may, for the purpose of removing the discrimination, remove the base line itself. In the establishment of rates it may be necessary to create or to destroy base lines; to make or unmake groups. This Commission is required to fix rates which are reasonable and non-discriminatory, and in the discharge of that duty it rests under no obligation to regard base lines which are in effect or zones which have long existed. The only limitation is that the rates established shall be in harmony with the requirements of the law."

The "differentials themselves" are in fact parts of a comprehensive and symmetrical tapering system.

The fourth reason given by the court below for the belief that the Commission was claiming a new power, viz.: power to create "trade zones," was that the differentials themselves plainly indicate such a claim. The court admitted, however, that if the real purpose was to inaugurate a "tapering system," the course may not abstractly be wrong. On this point the court said (Rec., —):

"We are not prepared to say that the Commission has not power to enter upon a plan looking toward a system of rates wherein the rates, for longer and shorter hauls, will taper downward according to distance, provided such tapering is both comprehensively and symmetrically applied—applied with the design of carrying out what may be the economic fact that, on the whole, it is worth something less per mile to carry freight long distances than short distances."

For the long distance from the Atlantic seaboard to the Missouri river, the Commission held that the inter-river rate applicable thereto should be 51 cents first-class, instead of 60 cents. Now in the case of Indianapolis Freight Bureau v. Cleveland, Cincinnati, Chicago & St. Louis Railway et al, 16 I. C. C. Rep., 56, 64, the question of rates from Indianapolis, Ind., to the Missouri river was raised and the Commission decided that on such traffic, being of a much shorter mileage, the inter-river portion should be 55 cents

first-class. Among other things, the Commission said:

"Indianapolis is nearer to the Missouri river than is the Atlantic seaboard, and following a well recognized and sound principle of rate making, the rates applied to the Indianapolis traffic for the haul from the Mississippi river to the Missouri river as parts or portions of the through rates should be more than on traffic from the Atlantic seaboard."

Taking these two cases together it is evident that the inter-river rates provided by the orders therein contemplate a gradual tapering according to distance and not an arbitrary division of trade territory. Undoubtedly, if Cincinnati shippers, for example, would bring a complaint against their rates to the Missouri river cities, and sufficient evidence was presented, the Commission would order the 60-cent scale reduced to somewhere between 51 cents, the Atlantic seaboard basis, and 55 cents, the Indianapolis basis. Obviously there is nothing unlawful about this plan; nor is there anything in the act excluding it from the power of the Commission.

VI.

The order does not prevent the carriers from removing the unjust discrimination (if any) alleged to result therefrom.

All traffic originating east of the Mississippi river and destined by rail to Missouri river cities must encounter these inter-river rates. A complaint was made against the application of these rates on Atlantic seaboard traffic and the Commission reduced them on that traffic. The order did not say that they should not be reduced on all other traffic, nor did it say that the Atlantic seaboard inter-river portions must be nine cents or any amount lower than these portions on other traffic. Who is responsible, then, for the resulting discrimination? tainly not the Commission's order. It was limited by the complaint pursuant to which it was made. Plainly this discrimination is due to the failure of the carriers to make the reduced rates apply on all The duty not to unjustly discriminate falls primarily on the carriers, and if, in their view, such is the effect of the contested order upon some parties not before the Commission, they (the carriers), should remove it as they are not, like the Commission, restricted to territory outlined in a formal complaint. Regarding this point the Commission said (page -), in its last annual report:

"It should also be noted that when the Commission fixes a given rate that rate thereby becomes the standard of reasonableness to which carriers must align their related rates. In the case before us, when the Commission reduced the rate from the Atlantic seaboard to Kansas City, it was the duty of the carriers to adjust their intermediate rates from Pittsburgh and Detroit accordingly. The resulting discrimination did not spring from the order of the Commission, but from the failure of the carriers in their duty to properly readjust their other schedules."

Pleading and Proof.

But let us touch a bit more in detail upon the pleading and proof in this case.

Appellees have no standing in court unless they allege and prove either:

- That the proposed rate is in and of itself unreasonably low, so low as to amount to confiscation, or
- (2) That the proposed rate would result in "undue prejudice" or "unjust discrimination" unless certain other reduction were made, which reduction would make some rates confiscatorily low.

And neither of these sets of facts have been alleged or proven.

T.

Confiscation.

As to the rates being in and of themselves unreasonable, i. e., confiscatorily low:

THE ALLEGATION: The only allegation contained in the bill that specifically applies to this aspect of the matter reads as follows:

"And your orator, for that the said order

* * compels your orators to serve a certain
class of people, to-wit: the shippers of the Atlantic seaboard, at an unreasonably low rate,"
etc. (R. 11.)

And the excerpt from R. 8 cited supra.

There are other allegations that the old rates were reasonable, etc., but these are the only allegations contained in the bill which can be construed as allegations that the proposed rates are unreasonably low.

Now it will be borne in mind that a rate must not only be low, but so unreasonably low as to amount to confiscation before a court of equity can interpose and by the writ of injunction stay the action of the Commission. "Unreasonably low" is an elastic term, and as interpreted by the courts means such an unreasonably low rate that if permitted to obtain would result in a substantial confiscation of a portion of the carrier's property by compelling him to perform the service at a loss. The converse of that proposition is, of course, what constitutes a reasonable rate, and that, says this Court, in Smythe v. Ames, in 169 U.S., is a rate sufficiently high to pay the cost of transportation, plus the cost of maintenance, plus a reasonable profit upon the property actually employed by the carrier in the service, when reasonably valued. Thus, it is seen, a bald statement like that found in the bill, that a rate is unreasonably low, is no more than the statement of a conclusion, and so is bad pleading. In its baldness it is not unlike an allegation that a certain thing was done fraudulently, without setting out the facts to warrant the conclusion that the thing was done fraudulently. Of course, it is axiomatic law that a bald allegation of fraud is no allegation, and will properly subject the pleading to demurrer.

So by the same token an allegation "that a rate is unreasonable" or "that a rate is unreasonably low" is bad pleading, in that it is pure conclusion. Whether a rate is unreasonably low is a thing to be determined by a proper tribunal, by applying the tests that the law prescribes. To properly allege that a rate is unreasonably low necessitates allegations, which, if true, would make the rate too low.

Adjectives are of no greater potency in a bill in equity than they are in law pleading; and in the matter in hand, instead of allegations which, if true, would warrant the court in concluding that the rate in question was unreasonably low, we have an adjective substitute for such allegations.

(b) PROOF: But let us assume that a confiscatory rate is properly pleaded. Upon this point there is absolutely no proof. There is not a scintilla of testimony in the whole record that even looks to the establishing of such a proposition. There has been no attempt made by the railroads to show that the rate is in and of itself unreasonably low.

The proposed order would establish an interriver proportional of 51 cents from the Misissippi to the Missouri river on shipments originating in Atlantic seaboard territory and destined for the Missouri river cities. It was shown that the establishment of the proposed rates would result in a reduction of \$140,000 in the annual revenues of the five complainant and the six intervening carriers, but absolutely nothing to indicate but that a fair and lawful return on the investment would still result. There is also some evidence to the effect that the traffic affected by the proposed rate (51 cents) is more costly to the carrier than the local traffic between the rivers carried at 60 cents, but there is nothing to indicate that the 60-cent rate may not be reduced 9 cents and applied to traffic more costly than local traffic, and yet result in a revenue entirely sufficient to make it a reasonable rate within the legal meaning of those words. Thus it is seen that there is nothing in the record to uphold such an allegation; and that being so, the injunction should be dissolved and the bill dismissed, because of the absence of proper allegation and proof of the fact that the proposed rate is confiscatory.

Hence it follows that the proposed rate is not objectionable for the reason that it results in the taking of private property without just compensation.

II.

Discrimination.

But the complainants have attempted to make discrimination the gravamen of the bill; but the allegations in this regard are insufficient, in that they fail to show

- (a) That the railroads are interested in or could be sufferers by the discrimination as such, if it existed, or
- (b) That the results of the establishment of the proposed rate would be to compel the railroads to violate the statute with respect to discrimination.

First let us consider

(a) The railroads' interest or absence thereof, in any discrimination, as such, that the new rate may produce:

The allegations are, that the proposed rate would result in discrimination to the detriment of Central Freight Association territory shippers. It is horn-book law that one can have no standing in court, as plaintiff or complainant in suit or action, based on a wrong done to another than himself. A court of equity, no more than a court of law, can tolerate a volunteer busybody, and that is the character of each complainants in this case.

Now, as a matter of fact, there is neither allegation nor proof in this record of any such discrimination as can be noticed by the courts; but whether there is discrimination against the shippers residing in Central Freight Association territory, and whether that discrimination is undue or otherwise, is not a matter in which the railroads have any interest. If the rate is in and of itself reasonable from the carrier's standpoint, the fact that some shipper, not a party to this suit, is wronged, is not a fact that gives to the carrier standing in this court. man must father his own lawsuit. No man can be permitted to adopt the supposed wrongs of another and present them in court. The reasons for this (1) Every man is supposed to be the best judge of whether or not he is wronged; (2) Every man is the best judge of whether he desires an exploitation of any grievance if he thinks one exists, and (3) The court shall not be burdened by litigation nor defendants harassed thereby until some injured party shall determine, first, that he has a wrong, and second, that he wants to litigate it.

Apply these thoughts to the case in hand. The carriers are solicitous about the Central Freight Association shipper. They are infinitely more concerned about him than he is about himself. The Central Freight Association territory embraces Ohio, Indiana, Illinois, and parts of Pennsylvania, Michigan, Wisconsin and Kentucky. If it were a fact that the shippers of this vast territory had impending over them disaster from undue discrimination, would they not rise as one man to voice this protest? And who are the witnesses the railroads have produced to tell of the wrongs to these shippers? Ten or twelve

railroad employes. And then who? First, a canmaker from Detroit, who thought the proposed rate would send his business to the "demnition bowwows," but who, on cross-examination, admitted that its only effect would be to reduce his Missouri river profits from \$12,000.00 to \$10,500.00; (R., 237-8), second, a paint and varnish man from Cleveland thought in chief that the proposed rate would work disaster to his company's business, but, on cross-examination, admitted that his company remaining in the territory affected by the proposed rate would depend on whether the profits were sufficiently large to permit them to absorb the cut, and then admitted that he did not know anything about what the profits were; (R., 259-60); third, a grocer from Chicago testified that the proposed rate might affect his distribution of olives; (R., 554), fourth, a man in charge of Marshall Field's insurance department, not his traffic man, but his insurance man, thought that the change would work evil to his house, but his knowledge of the situation is best shown by his statement that Marshall Field & Company had made no money in the last twentyfive years. (R., 350.)

But in all this vast territory, with the exception of the little town of Quincy, no organization of business men, Boards of Trade or Chambers of Commerce, have appeared with protest.

(b) No Discrimination.

The immediate foregoing is propounded upon the hypothesis that there was allegation and proof of undue discrimination against somebody, but as a matter of fact there is not. The allegations of discrimination are characterized by that same nebulous vagueness that marks the allegation about the unreasonable rate. Under the act, the only discrimination that is subject to the action of the Commission, of course, is a discrimination that is "unjust"; under the act, when a rate results in "unjust discrimination" or "undue prejudice," then we have a discrimination that can be noticed. There is no allegation in the bill that the rate would result in any discrimination that would be unjust or be productive of undue prejudice. Probably there are no two rates that is not, in lexicographical strictness, discriminative, since discrimination is nothing but difference. Webster says discrimination is, "The act of distinguishing: the act of making or observing a difference; a distinction; as a discrimination between right and wrong." So it is seen that there is many a discrimination that is of a kind that cannot be taken notice of either by the Commission or the courts.

What Discrimination Is.

To be noticed by the law, the discrimination must be an unjust, an undue discrimination. There is many a rate difference, and thus a rate discrimination, that is not an unjust or an undue difference or discrimination.

Undue discrimination is a discrimination resulting from substantially the same service being performed under substantially the same circumstances as another and charged for at a greater rate.

What constitutes "substantially the same circumstances" is sometimes rather a complex question. When gone into fully it involves the topography of the country, or parts of the country, whose rates are being compared; the density of population; the density of traffic; the length of haul; the value of the property employed, including terminals; and other matters as well.

And then it must be remembered, too, that the rate from Central Freight Association territory to the Missouri river has been complained of by nobody and is not now being challenged by anybody; the presumption must stand that that rate is a reasonable one, neither unreasonably high nor unreasonably low. Now it has been affirmatively declared by the Commission that the existing Atlantic-Missouri river rate is unlawfully high in that the inter-river proportion is unlawfully high. The proposed rate has been declared by the Commission to be a lawful and proper one.

Now the Court is up to the question: Will it be adjudged by a court of equity that a rate presumably fair and just, and which is unassailed, is unduly discriminatory when compared with another rate which has been found by the Commission to be just and fair, and which last named rate is not in and of itself challenged or assailed?

Now this record being absolutely barren of any allegations or proof of such discrimination as the law will consider, how can the complainants remain longer in court?

Does the Proposed Rate Compel Other Rates That Are Confiscatory?

There is nothing in the record either by way of allegation or evidence that suggests that the enforcement of the proposed rate would result in such a situation as would compel the railroads to put in other rates that would be confiscatory.

If it were a fact that the rates between Central Freight Association points and the Missouri river were so low that to reduce the interriver portion thereof to 51 cents would make the whole rate so low as to amount to confiscation, then undoubtedly the railroads would have a right here in court: because it could then be argued that, even if the proposed rate itself was not so low as to result in confiscation, the establishment of that proposed rate would compel the reduction in other rates which when reduced would be confiscatorily low. But that is a hypothesis that is not presented here: because, first, there is nothing in the record to suggest that the railroads would be obliged to reduce the interriver proportional of the Central Freight Association rates, and second, nothing to show that those rates are not sufficiently high, so that they could be reduced 9 cents, and still be reasonably high, under the legal definitions. Let us discuss a little in detail these two aspects of the matter.

Will the installation of the proposed Atlantic-Missouri river rate compel reduction in the Central Freight Association rates?

There is nothing in this record to show it. As shown above, a mere difference in rates does not amount to illegal discrimination. Before it could be urged or held that the proposed rate would compel reduction in the Central Freight Association rates, it must be shown that the services are substantially the same and performed under substantially the same circumstances. Now to be sure the carriage of merchandise between the Mississippi and the Missouri rivers. whether being carried on shipments originating in the Atlantic, or Central Freight Association territory, are substantially the same service; but since one is performed as a part of a much longer haul than the other, it cannot be said that the two services are performed under substantially the same conditions. As indicated supra, the length of haul is one of the conditions that determines whether the service is performed under substantially the same circumstances. A shipment made from Central Freight Association territory to the Missouri river is a shipment hundreds of miles shorter than one having its origin in the Atlantic Seaboard territory. is nothing in the record to show that the density of traffic is not much greater in the Atlantic Seaboard territory than in the Central Freight Association territory; and, of course, it goes without saying that every presumption is in favor of that rate being a lawful and proper one. Each man and corporation is presumed to act lawfully; and carriers are presumed to establish lawful rates when the contrary does not appear; and when we compare the two rates, the one applying on traffic originating in Atlantic seaboard territory and the other in Central Freight Association territory, both destined to Missouri river points, and there is a difference shown in their inter-river proportional, it is presumed until the contrary appears, that there exists such a disparity of conditions controlling the two hauls as to make the existing difference in rates lawful and proper. Now this record being absolutely barren of anything that would indicate identity of situation between the Central Freight Association haul, taken as a whole, and the Atlantic haul, taken as a whole, it must be presumed that there is absence of such identity, as would make it necessary to have the inter-river proportional of the two rates alike. From this it follows that there is nothing to show that the carriers would be obliged to reduce the interriver proportion of the Central Freight Association rate simply because they are obliged, under the order, to reduce the inter-river proportional of the Atlantic rate.

II.

Forced Possible Change in Inter-River Rates.

But even if it were established that the carriers would be obliged to reduce the inter-river proportional of the Central Freight Association rate 9 cents, in order to make it the same as the inter-river proportional of the proposed Atlantic rate, there is nothing in the record to suggest even that

it could not be done without violating any vested right of the carrier. If the Central Freight Association rate is sufficiently high so that its interriver proportion could be reduced 9 cents, and still the rate be a fair one from the carrier's standpoint; i. e., still be high enough to give them the cost of transportation, plus the cost of maintenance, plus a fair return on the property employed in the service when fairly valued, no such wrong would be worked to him as to entitle him to invoke the strong arm of equity.

So it is seen that whichever view of this phase of the matter is taken, the complainants are not helped.

The Power of the Government Over the Railroads.

The arguments urged by the railroads below, and which we have a right to assume will be repeated here, make it proper for us to discuss briefly some, perhaps, fundamental aspects of the lego-transportation question.

The railroads can only exist by virtue of the exercise of eminent domain.

Eminent domain is an incident of sovereignty.

No factor of sovereignty can be delegated without carrying with it the condition that it shall be exercised for the benefit of the sovereign, which, in America, is the people.

The railroads cannot exercise this governmental power freed from this trust—the duty of so exercising it—that it shall work advantage to the sovereign, the people.

For this reason Congress has dominion over these carriers, since that governmental power was delegated to the national government by the states, through the Constitution.

The railroad is a common carrier, and control of its business is within the regulatory power of the sovereign under which it lives.

As was said by this Court in Munn v. Illinois, 94 U. S., 113:

"The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge as one of the means of regulation is implied."

And again this Court says in C., B. & Q. R. R. Co. v. Iowa, 94 U. S., 155:

"Railroad companies are carriers for hire.

* * They are therefore engaged in public employment affecting public interest, and under the decision in Munn v. Illinois, supra, subject to legislative control as to their rates of fare and freight, unless protected by their charters."

This Court has again and recently spoken upon this subject in the case of Interstate Commerce Commission, Appellant, v. Illinois Central Railroad Company, Respondent, January 10th, 1910, case No. 233, in which it was held that an order of the Commission remedying a discriminatory distribution of cars by a coal road to coal mines could not be enjoined. This Court in that case said:

"The corporation as a carrier engaged in interstate commerce being then, as to interstate commerce business, subject to the control exerted by the act to regulate commerce and the instrumentalities employed for the purpose of such commerce, being likewise so subject to control, we are brought to consider the remaining proposition, which is; etc."

Delegation of Power.

While the power to regulate may not be delegated, there can be delegated by the body having the authority to regulate, the duty of ascertaining what proper rates are. This has been recognized as an incident of the common law since the time of William and Mary. At page 160 in Vol. 2 of Bacon's Abridgment, we find:

As to the regulation of the prices of carriage of goods, by the 3 W. & M. Cap 12, Section 24, it is enacted, "That the justices of the peace of every county, and other places within the realm of England, or domain of Wales, shall have power and authority, and are hereby enjoined and required at their next respective quarter or general sessions after Easter day, yearly to assess and rate the prices of all landcarriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdiction, by any common carrier or wagoner; and the rates and assessments so made to certify to the several mayors, and other chief officers of each respective market-town, to which all persons may resort for their information; and that no such common wagoner or carrier shall take for carriage of such goods and merchandises, above the rates and prices set, upon pain to forfeit for every such offense the sum of five pounds, to be levied by distress and sale of his or their goods, by warrant of any two justices of the peace where such wagoner or carrier shall reside, in manner aforesaid, to the use of the party grieved."

(For the regulations carriers are under with respect to the weight of their loads, and number of horses, upon highways and turnpike roads, see 13 Geo., 3, c. 78, and c. 84, and 21 Geo., 3, c. 20 and tit. Highways)

Now, if this can be done with relation to a carrier over whose business a degree of supervision is exercised by the government because of the fact that it is engaged in a public business, and for no other reason, how much more can the sovereign exercise dominion over a carrier who can only carry on its business by the exercise of a governmental power, to-wit: that of eminent domain? When the carrier confesses its inability to carry on the business that it desires to carry on without aid from the government, that is, by the exercise of the power of eminent domain, then we have infinitely more reason for applying the old English doctrine than in the case where a carrier did not invoke any such governmental powers.

Many states in the Union, a great majority of them, at least, have created railroad commissions, and their power to perform the functions incident to their existence in the matter of determining what reasonable rates are, has never been successfully questioned. As was said by this Court in Regan v. Farmers Loan & Trust Co., 154 U. S., 393, * "there can be no doubt of a general power of a state to regulate the fares and freights which may be received by a railroad or other carriers, and that this regulation can be carried on by means of a Such a commission is merely an adcommission. ministrative power created by a state for carrying into effect the will of the state as expressed by its legislation."

What can be done by a state in intra-state commerce, the federal government can do in interstate

commerce. The state has absolute domain over the commerce carried on within its borders, by common carriers, and particularly common carriers who live alone by the aid that the government gives them through the power of eminent domain; and by the same token, the federal government has absolute dominion over interstate commerce and its common carriers.

The Interstate Commerce Commission is but a result of the proper exercise of this power. This Court has held that the duties imposed upon it by the national legislature are proper: In *I. C. C.* v. Ry. Co., 167 U. S., 479-494, this Court said:

"The present inquiry is limited to the question as to what is determined should be done with reference to the matter of rates. There are three obvious and dissimilar courses open for consideration: Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty, or it might leave with the companies the rights to fix rates subject to regulation and restriction, etc."

Congress did choose to "commit to some subordinate tribunal," to-wit: The Inter-State Commerce Commission, this matter of determining what a proper rate was. Congress had a right to create such a body and clothe it with such authority; and if that body in the exercise of that authority made a rate that was not unjustly discriminatory, nor unduly prejudicial, and which was sufficiently large to pay all transportation cost and give to the carrier a reasonable return on the instrumentalities employed in the service, the rate is a lawful rate and must stand; and when the rate so made is assailed, the assault will fail if there is in the allegations of the assailant no showing that some one of the things hereinbefore indicated is true of the rate, viz., either that it is unduly prejudicial, that it is unjustly discriminatory, or that it is confiscatorily low. And one attempting to formulate such a charge against the rate must allege the facts that constitute the thing that makes the rate unlawful, and they have not pleaded such facts when they plead a bald conclusion.

Whether this case is comparable to the actions of subordinate governmental bodies such as act in immigration, land and postal matters, is unnecessary to be considered here; because even if the commission is not clothed with the absolute power to fix a rate that is conclusive upon the carrier, it cannot seriously be argued by a candid advocate that Congress may not give to the Commission the right to name a rate that must stand unless it be defective in some of the particulars above indicated.

Thus it is established that the Interstate Commerce Act is a valid piece of legislation, invading no provision of the Constitution; that the power conferred upon the Commission to fix the rates is not a delegation of legislative authority; that the order made is within the Commission's powers; that there is neither pleading nor proof that the order is unconstitutional by reason of its being productive of confiscatory rates, nor in violation of the Act because of its producing unlawful discrimination. The decree should be reversed with direction to dissolve the injunction.

No Change Unless All Change.

In this connection it might not be improper to observe that the logic of the railroad's contention is that there can be no change of rates unless all rates are changed. The law is that it is only when complaint is made that a rate is improper, that the Commission can consider that rate. Some shipper or group of shippers feel the pinch of an inequitable rate; they apply to the Commission; the railroad's logic would compel the Commission to say, "There are other people who are bound to be affected by this proposed change and your wrong cannot be righted so long as these other people are content to suffer their wrongs and make no appeal to us": or, if it be said that a complaint once being filed. all roads and communities affected by the proposed change may by order of the Commission be brought in,-Who is to determine who these other communities are? And are they to be dragged in and their freight rate changed whether they desire it or not? To speak with nice exactitude, a change in any rate in the country affects every other rate in some degree; and the conclusion of it all is that one suffering from a rate wrong, can obtain no redress from the Commission until the Commission is able to formulate an order that will result in exact equality to all persons and carriers who might in any degree be affected by a correction of the wrong complained of. This is, of course, only another way of saying that rate wrongs shall not be righted, because an investigation that would be necessary for such a consummation as above suggested would consume so much time that the attendant delay would be a denial of justice.

Manifestly, the reasonable interpretation of the act compels the conclusion that persons or communities suffering from a rate wrong can present their specific grievance and have it adjudicated; and if the change resulting, causes others to be sufferers, they in turn, can present their wrongs and have them righted; and no proposed change can be lawfully enjoined unless it appears to the Chancellor that the proposed rate is unreasonable within the definitions herein indicated, or would compel other reductions that would be unreasonably low within those definitions.

The railroads have heretofore contended in brief and argument, and we must suppose that they will renew the contention here, that "The property rights of railroad companies to charge and receive rates which are just and reasonable and non-discriminatory, are protected by the constitution of the United States, and whenever any railroad by proper proceedings asserts in court that this right is being invaded by any governmental body, the power and duty exists in the court to determine the issue and if it appears that said property right is being invaded, to protect the same by injunction."

One of the many troubles with the foregoing contention is that the bill in equity, that mirrors their supposed wrongs in this case, fails to show that the proposed rate is unreasonable within the meaning of the statute and the protection of the Constitution.

A Court of very high authority, the Circuit Court of Appeals for the Eighth Circuit in the case of Missouri, Kansas & Texas R. R. Co. v. Interstate Commerce Commission, 164 Fed., 645, has well expressed the thought forshadowed in the Smythe-Aimes case supra; namely, as to what constitutes a reasonable rate:

"To be just and reasonable within the meaning of the Constitutional guarantee, the rates must be prescribed with reasonable regard for the cost to the carrier and the services rendered, and for the value of the property employed therein, but this does not mean that regard is to be had only for the interests of the carrier or that the rate must necessarily be such as to render its business profitable; for reasonable regard must also be had for the value of the services to the public." 164 Fed., 645, l. c. 648.

And then goes on to say that a reasonable rate, as that expression is used in the act, means the reasonable rate within the Constitutional guarantee.

Now, as has been made plain *supra*, there isn't an allegation on which to base the conclusion that the proposed rate is unreasonable, or does violence to the rights of the railroads; and a bald statement expressive of a conclusion, unsupported by any allegations of *fact*, cannot stand against the presumption that the proposed rate was the result of an order that is valid. In the last cited case on page 650, the Court speaks of that consideration due to orders like the one before us:

"The Court will start with the presumption that the order is valid and was made after a careful consideration and a correct determination of every question of fact underlying it, and it should be accorded that respect and influence which ought to attend and does attend the action of any legislative or administrative

board whose members are in point of ability, learning and experience especially qualified to determine such matters. In short, the burden of showing that the facts are such as to render the order invalid, rests upon the carrier asserting it, and unless the case made on behalf of the carrier is a clear one, the order ought to be upheld."

The first thing necessary to a successful assault upon the presumption above described, is to allege some facts which, if proved, would warrant the Court's action and then to support such allegations by proof. Here there is no allegation and no proof of any fact that shows that the proposed rate does not pay "the cost to the carrier of the services rendered," and give a return upon "the value of the property employed therein."

Discrimination.

One of the contentions of the railroads before the lower court was expressed in these words:

"The order of the Commission violates Section 2 of the Interstate Commerce Act, which shipper for transportation of property any more than it charges any other shipper for a like and contemporaneous service for transportation under similar circumstances and conditions."

We have already pointed out the dissimilarity between the "circumstances and conditions" obtaining between the Seaboard-Missouri river haul and C. F. A.-Missouri river haul; but even though the "conditions and circumstances" were identical and the establishment of the proposed rate resulted in discrimination, then the railroads could not complain that they are compelled to violate the non-discrimin-

atory section of the act, because they have only to make such reduction in other rates as to eliminate the discrimination; and when they can do that without producing a non-remunerative, and so unreasonable, rate, they are in no position to appeal to the court; and there is in all this record made by them, no allegation and no proof that they cannot eliminate the claimed discrimination by a reduction of other rates, and no claim that such reduction as here suggested would result in rates that were not reasonable as that word is employed in the statute and interpreted in connection with the Constitutional guarantee.

The Base Line.

But the most extraordinary thing about this complaint is the fact that it seems to be an entire abandoning of what before the Commission the carriers strenuously contended was the proper method of rate making; to-wit: the base line method.

There are four possible methods of making rates: 1st. The postage stamp method. 2nd. The per ton per mile method 3rd. The base line method. 4th. The zone method; i. e., divide the county into zones and make a blanket or flat rate for each zone.

The postage stamp method of making rates is to make a rate the same all over the country, whether the points between the starting and delivery of the goods be far or near, just as a two-cent postage stamp carries a letter to the next town or across the continent. The ton per mile method is applied where for a certain commodity a fixed amount is charged per mile for each mile that the ton is carried, whether these miles be many or few.

The base line method means, in westward moving freight (and we are interested at this time in no other), that a rate is made to some north and south line called the base line, through from the point of origin, without any reference to any combination of locals east of that base line. To illus-The Mississippi river is a base line. rate from the Atlantic seaboard to the Mississippi river is made without any reference to any combination of locals on any point between the Seaboard and the Mississippi river. For example, the rate from the Seaboard to Pittsburg and from Pittsburg to the Mississippi river is greater than the rate from the Seaboard direct to the Mississippi river. This is true of Indianapolis, Cincinnati, Buffalo-in fact, all of the towns lying between the Seaboard and the Mississippi river. So a rate in, to a base line, or basing point, is fixed without reference to locals east of such line. And ordinarily the distribution out from the basing point, or base line, is on local rates. The terms base line and basing point are used to convey the same thought, although they are a little different. A basing point is a single town like Atlanta, Georgia, to which town the through rates are made without any reference to the combination of locals to the north thereof, and distributions are made out of Atlanta on locals; while a basing line is a line such as made by the Missouri river, where a series of towns like Omaha, St. Joseph and Kansas City are so alike in their situation with relation to westbound freight that the rate to all those Missouri river towns is the same.

As a matter of fact the Mississippi river rate is made with the New York-Chicago rate as a unit of measurement. The distance from the Seaboard to the Mississippi is 116% of the distance from the Seaboard to Chicago, and in order that the same ton per mile rate shall obtain from the Seaboard to the Mississippi as obtains from the Seaboard to Chicago, the Mississippi rate is made 116% of the Chicago rate.

The postage stamp rate is recognized as impossible. The ton per mile rate, while theoretically just, cannot be universally applied in this country.

The base line method of making rates is recognized by the Commission in the very opinion under consideration, as well as elsewhere, as the accepted method of making westward moving rates. A very fair exposition of the origin and evolution of the base line method of making rates is found in Mr. Barlow's argument, which was interpolated into this record by the complainants. (R., 370.) He stated that the base lines were those lines where the geography and history of the country made it necessary that the westward moving traffic should break; and mentioned as two of those places the Mississippi river and the Missouri river; and said. and truly, that in ante-railroad days freight was moved wholly by steamboat, and broke bulk from the holds of the steamboats at the Mississippi and Missouri rivers, and were then loaded on other means of conveyance to continue their journey westward.

The base line method of making rates means that as the country develops and population increases, and the volume of traffic is augumented, it becomes necessary to fix new base lines farther and farther from the initial eastern point. Chicago is a basing point for certain territory. The Mississippi river is a basing point for certain territory. Missouri river is a basing point for certain territory. One of our complaints in this case was that, although the Missouri river was admitted to be a base line, still all class goods destined for the Missouri river moved under a combination of locals on the Mississippi river, i. e., the rate to the Missouri river was made up by adding to the through rate to the Mississippi, the local rate from the Mississippi to the Missouri river. We then claimed that we were entitled to a through rate to the Missouri without reference to a combination of locals on the Mississippi, just as the Mississippi was receiving a through rate without reference to a combination of locals upon any point east of it. Chicago was a basing point before the Mississippi became one, because the development of the country caused the situation at Chicago to be such as to make it proper to make it a basing point, before that degree of development was reached upon the Mississippi river. As the country developed in population and resulting commerce moved westward, it came to pass that the Mississippi river bore such a relation to the transportation situation as to entitled it to be made a base line for certain territory, and it was done. And now the development of the country to the west has brought the Missouri river to that situation that entitled it to be made a basing line. The progress of the country to the westward will doubtless result ultimately in the establishment of basing lines still further to the west.

The result of employing the base line method of making rates, westbound, is that different territories have different base lines. For the territory served by Chicago on local rates Chicago is the basing point; that is to say, the through rate from the Seaboard to Chicago is made without reference to any combination of locals on any point east of Chicago, and then if the freight is destined for the territory served by Chicago at local rates, the rate breaks on Chicago, and to any point in that territory, the rate is made by adding to the through Chicago rate the local rate out from Chicago to the point served on locals.

Now, when the shipment is destined to a point between the Mississippi and the Missouri rivers, then we have another base line; that base line is the Mississippi, and to all the territory served by the Mississippi river towns on local rates, the rate is made by adding to the through Mississippi rate the local out; to illustrate: the rate to Jefferson City, Mo., is made by adding together the through rate to the Mississippi and the local rate from the Mississippi to Jefferson City.

Now, when goods are destined to or beyond the Missouri river a new basing line transpires, to-wit: the Missouri river; and the territory served by the Missouri river towns on local rates has for its basing line the Missouri river. And the rates into that territory are made up of the through rate to the Missouri river from the Seaboard, plus the local rates out.

If we had to determine what stage of develop-

ment the country had to reach before the base line should be fixed, we might have before us a question of some complexity, but the railroads have saved us the trouble by frankly admitting that the Missouri river is now a basing line.

(R., -.)

Now during the hearing before the Commission, and during the taking of testimony preceding that hearing, the carriers constantly contended that the granting of our prayer would result in the destruction of the base line method of making the westbound rates; but we contended, as the Commission found in substance, that the Missouri river was a basing line, and so entitled to a through rate from the Atlantic Seaboard without reference to a combination of locals on any point east of the Missouri; and that the recognition of that truth did not destroy, but rather tended to recognize more fully, the base line method of rate making. On westward moving freight there are now three base lines: Chicago, the Mississippi river and the Missouri river. rate to Chicago is 75 cents, and that is made without any reference to any combination of locals east of Chicago: the rate to the Mississippi is 88 cents. or 116% of the Chicago rate plus one cent, and that rate is made without reference to any combination of locals east of the Mississippi; the rate first-class to the Missouri river is, under the Commissions's order \$1.39, which rate is fixed without reference to a combination of locals on any point east of the Missouri.

But in this bill of complaint the carriers forgot or ignored all that has been said by counsel, experts, commissions and courts about the base line method of making westward rates, and say that the proposed order would result in discrimination because shipments from the Atlantic Seaboard territory to the Missouri would move on other than a combination of locals on the Mississippi.

Now we are not here to say that the base line method of making rates is ideal, but we are here to say what the Commission has said before us, that it is a method of making rates so firmly established, and having so much that can be said in its favor, that it is folly to attempt to wholly overturn that method now. This method of making rates recognizes one of the great transportation principles; viz. that the longer the haul, the lower the ton per mile rate should be. This is sound economics. for the reason, among others, that terminal expenses both at the point of origin and point of delivery are always large. This terminal expense involves the question of investment, and in cities like Chicago, New York, St. Louis and Kansas City represent enormous investments; interest must be earned upon that investment; it goes without saying that the cost of handling at terminal points, loading into cars at point of origin, and out of them, into the freight houses, at point of delivery, is very great. Now if these terminal expenses are distributed over 500 miles, the ton per mile expense for the whole transaction is bound to be less than if only distributed over 50 miles; hence the wise conclusion that the longer the haul, the lower the ton per mile rate should be. In fact, it has been held that a local rate is prima facie excessive when employed as part of a through rate:

"A local rate which presumably is adopted

as covering both the initial and final expense of the haul is *prima facie* excessive as a part of the through rate for a through line composed of two or more carriers. *McMora* v. *Grand Trunk* R. R. Co., 2 I. C. C. Rep., 604; *Alabama R. R. Co.* v., 4 I. C. C. Rep., 348.

The foregoing is upon the hypothesis that the transportation conditions other than the length of haul are substantially similar. Of course, it goes without saying that a long haul may properly have a much higher ton per mile rate than a short haul, if the long haul is through a sparsely settled territory where operating conditions are very expensive, and the short haul is through a thickly peopled district with dense traffic and easy operating conditions.

So it is seen that the recognition of the base line method of making rates, since it is a recognition of this last named principle, is so far sound; and it is with entire propriety that the Commission recognizes what the carriers admitted, that the Missouri river was a basing line, and made Atlantic Seaboard rates to that base line that were lower per ton mile than when made up of a combination of locals on the Mississippi.

And this thought is another answer to the complaint in the bill that the inter-river proportion of Atlantic Seaboard rates is less than that proportion of Central Freight Association rates, both shipments being destined to the Missouri river. To haul from the Seaboard to the Missouri is hundreds of miles longer than to haul from any point in Central Freight Association territory to the Missouri. That being so, the ton per mile cost should

be less in the former than in the latter case; the Commission recognized this; and looked at the whole rate and found that the only portion complained of was the west of the Mississipi portion; it investigated and found that that rate was too high, to use their exact language, appearing on page 313 of the decision:

"The through rates so established are in our opinion unreasonably high. This is so because those portions of the through rate which apply between the Mississippi crossings and the Missouri river cities are too high";

And having so decided it became necessary for them to reduce this part of the rate; and this they did; and in so doing gave recognition to the base line method of making rates, which the railroads say is a fixed transportation fact in this country. On this point the Commission squarely said: "We are not impressed with the view that the system of making rates on certain basing lines should be abolished." By this order, too, the Commission gave recognition to the principle that the longer the haul the lower the rate per ton mile should be; and in so doing created no such discrimination as can be complained of.

The local rate from Buffalo to Chicago is higher than the Buffalo-Chicago proportional of the New York-Chicago rate; the local from Indianapolis, Cincinnati, Cleveland to either Chicago or St. Louis is higher than the proportions between these towns and Chicago and St. Louis, of a through rate from New York to either St. Louis or Chicago; and this is a truth, shown by every comparison between all local

and proportional rates, between any town intermediate between New York and the Mississippi, and the latter point.

The foregoing seems to us an answer to the complaint urged below that, "The order of the Commission is an attempt to destroy the natural rate structure of the West which is entirely legal and which has existed since railroads were constructed into that territory and under which equal opportunities and competition is afforded the Western distributing centers, and upon which all business enterprises of the section have been based, and to substitute therefore an arbitrary, artificial rate system, destructive of the commercial interests of the West and involve undue discrimination against railroads in violation of Section three of the act to regulate commerce." We have already seen that the "rate structure of the West" is built on the base line method; the proposed rate is but an extended recognition of the base line method; all business built in the Central Freight Association territory or in the Trans-Mississippi territory was built with a knowledge of the fact that the rate system that governed these territories, so far as it affected westward moving freight, was built on the base line system. history of that system makes plain that new base lines become necessary, as the march of civilization progresses westward. The proposed rate is a giving of complete recognition to the Missouri river as a base line.

The man who erected a business in the Seaboard territory in the days when the only base line had its northern terminus at Buffalo, knew that in the fulness of time another basing point must be established further west; and the one who built his business in the territory intermediate between Buffalo and Chicago in the days when Chicago had become a basing point, knew that it was but a matter of time when another basing line or point must be established further west; and the man who builded business in Chicago while the Mississippi was the recognized base line knew that it was but a matter of passing years when still further to the west another base line must be established and, of course, the Missouri river is the obvious place for the establishment of a base line next west of the Mississippi. the proposed rate so far from being destructive of the "rate structure of the West," is but an application of the method on which this system rests, on an extended scale made necessary by the expansion of the country's commerce.

Terminal Expense.

There is testimony to the effect that the terminal expense at St. Louis and Chicago on through stuff reshipped at these two points, is greater than on the local stuff having its origin at these cities and destined for the Missouri river. As to Chicago, the testimony has no bearing, and is not germane to the situation, because the 87-cent rate (now 88 cents) to the Mississippi river takes care of and absorbs the terminal charges at Chicago, and has nothing to do with this question, which is one of rates west of the Mississippi. If it be a fact that it costs more to get Missouri river freight through Chicago to the

Mississippi, than it does freight having its origin at Chicago and destined for the Missouri river, it cuts no figure here, because the Chicago transfer or rehandling expense is included in the 87-cent rate to the Mississippi river, and that is a rate not now under consideration.

With relation to such an expense transpiring at St. Louis, that testimony might have bearing, if it was shown that the cost of handling this class of shipments was so great by virtue of the rehandling at St. Louis, as to make the rate non-compensatory and confiscatory; but there is nothing in the record that suggests this. Take all this testimony, at its face, and it simply results in establishing that the through shipments were more expensive to the carriers than the locals; and that, of course, cuts no figure until it is established that the expense is great enough to make the rate unremunerative.

Rebates.

We have so far discussed the matter upon the hypothesis that the rates actually employed by the carriers in times past were the tariff rates, that is the rates printed in the published tariffs, but the record discloses from the testimony of Mr. Crosby, the general freight traffic manager of the Burlington (R., 200), that the prevailing rebates obtaining prior to the enactment of the I. C. C. Act made the through class rates from Atlantic Seaboard to Missouri river points approixmately 10% less than those printed in the tariff schedules; so the rates obtaining, the real rates, were 10% less than \$1,47, or 14 cents less than \$1.47, to-wit: \$1.33.

The significance of this evidence lies in the fact that the then through rate, the rate long obtaining between the Atlantic Seaboard and the Missouri river, was 6 cents less than the rate they now complain of as being too low. Another significance that attaches to this rebate situation is that the paying of them, and thus establishing the low rate resulting from them, was a recognition by the carriers of the right the Missouri river had to a rate lower than the combination of locals on the Mississippi.

JOHN H. ATWOOD,
GEORGE T. BELL,
JOHN L. WEBSTER,
Solicitors for Intervening Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 663.

THE INTERSTATE COMMERCE COMMISSION,

Appellant,

VS.

THE CHICAGO, ROCK ISLAND AND PA-CIFIC RAILWAY COMPANY, ET AL.

No. 664.

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY, ET AL.,

Appellants,

VS.

THE CHICAGO, ROCK ISLAND AND CIFIC RAILWAY COMPANY, ET AL.

No. 641.

THE INTERSTATE COMMERCE COMMISSION,

Appellant,

VS.

CHICAGO, BURLINGTON & QUINCY RAIL-ROAD COMPANY, ET AL.

BRIEF FOR THE RAILROAD COMPANIES, APPELLEES.

STATEMENT.

The above causes numbered 663 and 664 are separate appeals, one by the Interstate Commerce Commission, and the

other by certain jobbers of merchandise, interveners, from a final decree entered by the Circuit Court of the United States for the Northern District of Illinois. The decree was entered in a suit brought by certain railroad companies against the Interstate Commerce Commission, and it set aside and annulled a certain order of that tribunal. Said order of the Commission required carriers operating between the Mississippi and Missouri Rivers, to transport, between said rivers, merchandise shipped to the Missouri River Cities from the Atlantic Seaboard Territory, at a lower rate than was charged the public generally for transporting similar merchandise between the said rivers. The purpose of this order of the Commission was to abolish the system of rate-making, which has always obtained, whereby rates "break" equally for all shippers at the Mississippi River. The Atlantic Seaboard Territory comprises all territory north of the Potomac River and east of a line drawn through Buffalo, Pittsburg and Parkersburg.

Case numbered 641 is an appeal from an interlocutory decree entered by said Court in a suit brought by certain rail-road companies against the Interstate Commerce Commission. By the interlocutory decree, the Court suspended an order of the Interstate Commerce Commission which required carriers operating between Chicago and St. Louis and the Missouri River, and between the Missouri River and Denver to charge lower rates for the transportation of merchandise between Chicago and Denver and St. Louis and Denver, than the rates charged for the transportation of similar merchandise from Chicago and St. Louis to the Missouri River Cities and from the Missouri River Cities to Denver. The purpose of this order of the Commission was to abolish the system of ratemaking, which has always obtained, whereby rates "break" equally for all shippers at the Missouri River.

In the bill filed in each case, the order of the Commission complained of, is set forth in full in the body of the bill; and copies of the complaint filed with the Commission and of the report of the Commission are attached as exhibits.

In the first case, certain railroad companies not made parties to the order of the Commission, intervened as co-complainants by leave of Court, as did also, certain shippers at Chicago, Milwaukee, St. Louis, Detroit and Cleveland. Certain shippers at Omaha, Kansas City and St. Joseph, by leave of Court, intervened as co-defendants. Issues were formally joined and testimony taken.

In the second case, the suit was begun by filing a bill on the part of the railroad companies, complainants; an application for an interlocutory decree was duly made and proper notice given, and affidavits made by James J. Hill, Marvin Hughitt and E. P. Ripley, filed in support of said application. The Interstate Commerce Commission filed a demurrer to the bill.

As the two cases present the same question, the hearing of the first case for final decree and the hearing of the second case upon the application for the interlocutory decree, were submitted to the said Circuit Court at the same time. That Court, deciding both cases in one opinion (Transcript case 663, page 1053) held that the orders of the Commission were beyond the delegated authority of that body and were void. The final decree was entered in the first case, and an interlocutory decree entered in the second case.

Appeals, as above mentioned, having been perfected from the said several decrees, the cases have been, by order of this Court, set down for hearing together as one case.

* * *

In order to properly consider and decide whether the orders of the Interstate Commerce Commission in question in these cases were within the authority of the Commission, it is essential to have a knowledge of

- (1), the history of railroad construction in the west;
- (2), the history of the establishment of the rate structure in the west;
- (3), the manner in which the commercial development of the west is intimately related to and dependent upon the rate structure which has obtained in that section for more than a quarter of a century.

All of thse things appear, clearly and without contradiction, in the testimony given in these cases.

THE HISTORY OF RAILROAD CONSTRUCTION IN THE WEST.

The railroads of the United States are not single systems begun at the sea coast and extending thence continuously across the continent. On the contrary, the railroad building of the United States was closely related to, and affected by, the commercial development of the country.

Chicago, St. Louis, Omaha, Kansas City and St. Joseph were commercial centers before railroads were constructed to them. Each city had a natural advantage and opportunity of shipment by water, and each had become a commercial point with established trade relations by virtue of the natural advantages aforesaid. Because of the fact that these cities were established trade centers and recognized distributing points, railroads were built to these cities from the east. Separate and independent railroads were, for the same reason, begun at these cities and extended thence westward. Thus, railroads were constructed from the Atlantic Seaboard to the cities of Chicago and St. Louis and there terminated. Sep-

arate and independent railroads were constructed from the cities of Chicago and St. Louis westward to the Missouri River Cities mentioned, and there terminated. Separate and independent railroads were built from said Missouri River Cities westward, some terminating at the city of Denver. Separate and independent railroads were constructed, beginning at the city of Denver and running thence westward. This was likewise true of the cities of St. Paul, Minneapolis and Memphis.

The cities mentioned, therefore, were served by one set of railroads which extended to the said cities from the east, and there terminated, and by another set of railroads which began at the said cities and extended thence westward. These different sets of railroads were, as was said, independent of each other and under separate management and ownership. This is the history of railroad construction in the west.

THE HISTORY OF THE ESTABLISHMENT OF THE RATE STRUCTURE OF THE WEST.

The rate structure throughout the west, followed the construction of the railroads. The lines from the east into St. Louis fixed their separate tariffs of charges for the transportation of merchandise from their points of origin on the eastern seaboard, to their terminus in the city of St. Louis. The lines of railroad which began at the city of St. Louis and extended westward to the Missouri River cities, where they terminated, established their separate tariffs of charges for the transportation of merchandise from the said city of St. Louis to the said Missouri River Cities, the termini of the roads. The roads which began at the said Missouri River Cities and extended westward to the city of Denver, established their separate tariffs of charges for the transportation of merchandise over their lines from the points of origin, the

Missouri River Cities, to the terminus, the city of Denver. The lines of railroad which began at the city of Denver and extended thence westward, established their separate tariffs of charges for the transportation of merchandise over their lines from the city of Denver to westward points. Each of the said railroads maintained its separate charge for the transportation of merchandise over its line, as above set forth, excepting only, in those cases wherein, by reason of competitive conditions, they were compelled to establish or join other railroad companies in establishing different rates to meet rates fixed by other railroads and routes.

The railroad companies, whose lines extend from the Atlantic Seaboard to the city of St. Louis, have established, published and filed tariffs of charges for the transportation of merchandise from said seaboard territory to the city of St. Louis, and apply to such transportation, what is known as the official classification. Railroads extending from the city of St. Louis westward, and railroads extending from the Missouri River Cities westward have established, published and filed their tariffs of charges for the transportation of merchandise from the city of St. Louis and from said Missouri River Cities westward, and apply to said transportation, what is known as the western classification. The two classifications differ in that certain commodities are placed in one class in the official classification, and, in the western classification, are placed in another class.

The lines of railroad extending from the Atlantic Seaboard to the city of St. Louis, and those extending from the city of St. Louis to the Missouri River, are the shortest lines from the Atlantic Seaboard to the Missouri River. Consequently, the rates established by the railroads operating lines from said seaboard territory to the city of St. Louis, and the rates established by the railroad companies operating between the city of St. Louis and the Missouri River, fix the aggre-

gate charge for the transportation of merchandise from said Atlantic Seaboard Territory to the Missouri River. Therefore, the railroad companies operating lines from the Atlantic Seaboard Territory to the city of Chicago, and the railroad companies operating lines from the city of Chicago westward to the Missouri River, were compelled, in order to share in the transportation of merchandise from the seaboard territory to the Missouri River Cities and beyond, to equalize their rates for the transportation of merchandise from the Atlantic Seaboard Territory to the Missouri River Cities, with the rates in and out of St. Louis; and they therefore apply the official classification and the St. Louis rates to the transportation of all such merchandise from the Atlantic Seaboard Territory to the various Upper Mississippi River Crossings, (being the cities at which the respective lines of railroad cross said river). No joint through rate from the Atlantic Seaboard to the Missouri River Cities or to Denver has ever been filed.

This is the history of the establishment of the rate structure of the west. This rate structure, established when the railroads were constructed, as above set forth, has been maintained by the roads until the present day.

THE RELATION OF COMMERCIAL CONDITIONS TO THE RATE STRUCTURE AFORESAID.

By reason of the fact that railroads were constructed from the Atlantic Seaboard to the city of St. Louis, as above set forth, and there terminated, and the further fact that other and independent railroads were constructed from the city of St. Louis westward to the Missouri River Cities and there terminated, and by reason of the fact that each of said railroad companies maintained its separate tariff of charges for the transportation of merchandise over its road, it fol-

lowed that all merchandise shipped from the Atlantic Seaboard to the Missouri River Cities was charged, by the eastern railroad, its tariff rates for the transportation of said merchandise from the seaboard to the city of St. Louis; and, by the western railroad, its tariff rate for the transportation of merchandise from the city of St. Louis to the Missouri River Cities. If a merchant at St. Louis purchased merchandise in the city of New York and shipped the same to his warehouse in the city of St. Louis, he paid thereon the tariff charge of the eastern railroad for the transportation thereof from the city of New York to the city of St. Louis; and, if he re-shipped the merchandise to a Missouri River City, he paid the western railroad its tariff charge for the transportation of said merchandise from the city of St. Louis to the said Missouri River City. Thus the merchant of St. Louis could deliver merchandise at the Missouri River Cities at the same aggregate freight charge as that collected when the goods were shipped to said Missouri River Cities by his competitors in the city of New York or in the Missouri River Cities. virtue of this fact, the merchants at St. Louis enjoyed, so far as freight rates are concerned, an equality of opportunity in competition with their competitors at the Atlantic Seaboard and at the Missouri River.

Because of the fact that railroads were constructed to the Missouri River Cities from the east and there terminated, and the further fact that other and independent railroads were constructed from said Missouri River Cities westward, and the further fact that each of the said railroad companies established and maintained its separate tariff of charges for the transportation of merchandise over its line from its point of origin to its terminus, merchants at the Missouri River Cities could receive merchandise from Chicago, St. Louis or the Atlantic Seaboard and reship the same to the city of Denver at the same aggregate freight charge as that imposed

upon shipments direct from Chicago, St. Louis or the Atlantic Seaboard, to Denver. Thus the merchants upon the Missouri River, by virtue of the rate situation aforesaid, enjoyed an equality of opportunity in competition with their competitors at Chicago, St. Louis, the Atlantic Seaboard and at Denver.

As the rate structure above described has been maintained in the western country ever since the railroads were constructed and for more than a quarter of a century, it is clear that, during all that time, the merchants at all these western distributing centers have enjoyed the equality of opportunity in competition with their competitors to the east and to the west, which resulted from said rate structure.

Because of the equality of opportunity in competition afforded the said distributing centers, Chicago, St. Louis, the Missouri River Cities, Denver and others, merchants in all lines of business and people whose interests were affected by transportation conditions, located in large numbers at each of these commercial centers, and large sums of money have been invested in mercantile enterprises at each of these cities. All of this has been done upon the faith of the rate adjustment which has so long obtained. The commerce of all these cities is manifestly dependent upon and intimately related to the rate structure of the west, in that the equality of opportunity in competition thereby afforded, is essential to their continued prosperity and development.

Because of the fact that the tariffs of the eastern railroads for the transportation of merchandise, as above mentioned, cover only transportation to the Mississippi River, and because new tariffs apply to the transportation of merchandise between the Mississippi River and Missouri River, and new tariffs apply to the transportation of merchandise west of the Missouri River, it is commonly said that the rates "break" at the Mississippi River and at the Missouri River. So likewise, rates are said to "break" at the cities of St. Paul, Minneapolis, Memphis and other points.

The natural rate structure which has been described, applying to the transportation of merchandise from the east to the west, likewise applies to the shipments eastward, of the products of the west. The grain of Nebraska is not shipped east on any rate less than the sum of the rates into and out of intermediate points. If the Nebraska grain is shipped east by way of St. Louis, the shipper pays the rate from the point of origin to the Missouri River, plus the rate from the Missouri River to St. Louis, plus the rate from the city of St. Louis to New York; if the grain goes by way of Chicago, the shipper pays the rate from the point of origin to the Missouri River, plus the rate from the Missouri River to Chicago, plus the rate from Chicago to New York. So it is with respect to live stock produced in the west. The rates on live stock allow the shippers in the west to ship the same to the markets of Fort Worth, Kansas City or Omaha, and, if no satisfactory market price is obtained there, to re-ship the same to Chicago or St. Louis, without increase in freight charge. So grain from the west may be stopped at numerous milling points west of Chicago, ground into flour and re-shipped without increase in freight charges. So logs may be shipped, sawed into lumber and re-shipped without increase in freight charges.

We thus see that by virtue of the rate structure of the west, merchandise from the east may be stopped, handled and re-shipped at the various distributing centers without any increase in freight charges, and the products of the west may be stopped, handled and re-shipped at various points without increase in freight charges.

When it is remembered that up to the present time the distribution of merchandise and supplies has been a large, indeed a predominant, factor in the business and commerce of the cities located upon the Missouri River and throughout the

west, and that these conditions seem likely to continue at least for a considerable time in the future, and that the commerce of these centers in the distribution of merchandise and supplies is absolutely dependent upon the rate structure aforesaid, which permits the stopping and handling of merchandise and supplies without increase in freight charges, thereby affording equality of opportunity in competition to the markets in the east and west, it will be seen how vital the rate structure above described, and for so long obtaining, is to the prosperity and development of the western country.

The orders of the Interstate Commerce Commission, in controversy in these cases, were entered for the purpose of destroying the rate system aforesaid, and of overturning the equality of opportunity in competition which the said commercial centers enjoy under the present system, and of substituting therefor, an artificial rate system the essential feature of which is special advantages in rates to special sections.

The order condemned by the decree in Case Number 663, was one entered by the Commission on the complaint of Burnham-Hanna-Munger Dry Goods Company, et al., jobbers of merchandise in the cities of Kansas City, St. Joseph and Omaha. The complaint filed by the merchants with the Commission, alleged that the railroad companies made a lower rate from the Atlantic Seaboard Territory to the cities of St. Paul and Minneapolis, than the rates charged on merchandise from the Atlantic Seaboard Territory to the Missouri River Cities; and further alleged that there was no justification for the difference in the rates, and that, therefore, the railroad companies were unduly discriminating in favor of St. Paul and Minneapolis and against the Missouri River Cities. commercial bodies of St. Paul and Minneapolis intervened in the case, resisted this contention of the complainants, and asserted that the lower rates to St. Paul and Minneapolis, were fixed by water routes by the Great Lakes. On this contention, the controversy was one between localities; viz: the Missouri River Cities on the one side, and the cities of St. Paul and Minneapolis on the other. The Commission held that the fact that there was water competition in the transportation from

the seaboard territory to the cities of St. Paul and Minneapolis, which fixed the rate, justified the lower rate to those cities, and hence that such rate was not an illegal discrimination.

The complainants further attacked the rate system above mentioned, so far as it related to the breaking of rates at the Mississippi River, and sought a readjustment of rates that would enable them to ship merchandise from the Atlantic Seaboard Territory to the Missouri River Cities, at a less aggregate charge than that imposed for transporting merchandise from the seaboard to the Mississippi River, and from the Mississippi to the Missouri River Cities. As the success of this contention would put the merchants of Chicago and St. Louis at a disadvantage as compared with the merchants of the Missouri River and upon the Atlantic Seaboard, the commercial bodies of Chicago and St. Louis intervened in the hearing before the Commission to protect the present rate structure.

It should be noted (see opinion of the Commission, Transcript case 663, p. 25), that while the Missouri River merchants attacked the system of rate-making whereby the rates break equally for all shippers at the Mississippi River, they claimed that the practice of so breaking rates at the Missouri River, should not be abolished. In other words, where the change of the system of rate-making would benefit the Missouri River jobbers at the expense of their competitors at Chicago and St. Louis, they desired a change; but, where the change would benefit their competitors at Chicago and St. Louis and Denver at their expense, they were opposed to a change.

This controversy, therefore, was also one between localities; between the Missouri River Cities on the one side, and the cities of Chicago and St. Louis on the other.

The case, therefore, was one wherein an effort was made by the merchants of certain cities to secure an advantage over their competitors, in other cities, through a readjustment of rates.

The Commission recognized the character of the controversy. In the opinion of the Commission, it is said (Transcript case 663, p. 22):

"In testimony, briefs and argument complainants make a strong attack upon the long-established system of rate-making under which rates to points west of the Mississippi River are made upon the basis of the rates to the Mississippi River Crossings."

The Commission further said (Transcript case 663, p. 24):

"Complainants insist that the system of basing rates to the Missouri River cities and points beyond, upon the Mississippi River Crossings is improper. Their expert testified that the Mississippi River basis should be abolished, but he did not think the Missouri River basis should be abolished, because in his opinion, the country west of the Missouri River had not developed sufficiently as yet to warrant that change."

The Commission further said (Transcript case 663, p. 25):

"It is therefore proper for us to here look into the question of not only what the rates are, but upon what principles they are constructed, by what conditions they are controlled, and what would be the effect of important changes therein."

The Commission saw very clearly that if the rates from the Atlantic Seaboard to the Mississippi River were reduced on all shipments, and if the rates from the Mississippi to the Missouri River were reduced on all shipments, the equality of opportunity in competition inhering in the rate system, would be preserved, and the Missouri River Cities would get no advantage thereby, as against their competitors.

The Commission, speaking of rates from the Atlantic Seaboard Territory to the Mississippi River, said (Transcript case 663, p. 31):

"It seems patent that any change in the rates east of the Mississippi River, even if warranted, would fail to accomplish what the complainants desire, because whatever of advantage accrued therefrom to the Missouri River cities, would accrue to a like degree or extent to their principal competitive commercial centers, to-wit: New York, Chicago, St. Louis and the Twin Cities."

Speaking of the rates between the Mississippi and Missouri Rivers, the Commission said (Transcript case 663, p. 32):

"If the local class rates of defendants between the Mississippi and Missouri Rivers were reduced, it would give the same degree of advantage to all the producing and distributing centers on and east of the Missouri River, and their relative advantages or disadvantages would not be changed, while a very serious inroad upon the revenues of the carriers would inevitably result, and at a time of industrial depression when it could not well be borne."

The Commission took up and considered the rates charged by the railroad companies for the transportation of merchandise between the Mississippi and Missouri Rivers, and said (Transcript case 663, p. 33):

"The local class rates between the rivers are high, but this is not the time to precipitate such a violent change as would follow an important reduction of them."

The Commission, while thus declining to find the rates between the rivers to be unreasonable, did, in order to establish a new principle in rate-making and to overturn the present rate structure, find that these rates were unreasonable as applied to traffic from the seaboard. In other words, that tribunal found that while the rates between the rivers were not in themselves unreasonable, they were unreasonable when used as factors in the aggregate charge imposed on traffic from the seaboard to the Missouri River Cities. This conclusion of the Commission is stated in the opinion as follows (Transcript case 663, pp. 33 and 34):

"As has been stated, the through rates from the Atlantic Seaboard territory to the Missouri River cities are made by adding together the rates from points of origin to the Mississippi River Crossings, using proportional rates when such are available, and the local class rates from Missisippi River Crossings to the Missouri River cities. The through rates so established are, in our opinion, unreasonably high. This is so because those portions of the through rates which apply between the Mississippi River Crossings and the Missouri River cities are too high."

The Commission's order, in the case, made no change in the rates fixed by the tariffs of the eastern carriers for the transportation of merchandise between the Atlantic Seaboard Territory and the Mississippi River. The Commission's order made no change in the published tariff rates of the western carriers for the transportation, for the public generally, of merchandise between the Mississippi and Missouri River Cities. The order of the Commission, however, in accordance with the contention of the complainants and against the contentions of the intervening commercial bodies at Chicago and St. Louis, directed that the carriers operating between the Mississippi and Missouri Rivers, should change their tariffs for the transportation of merchandise between said rivers and charge for the transportation between said rivers of merchandise which originated in the Atlantic Seaboard Territory, rates lower than their generally published tariff rates, the reductions being as follows: On first class, from 60 to 51 cents; on second class, from 45 to 38 cents; on third class, from 35 to 30 cents;

on fourth class, from 27 to 23 cents; on fifth class, from 22 to 19 cents.

The effect of this order, if enforced, would therefore be that rates on shipments of merchandise from the Atlantic Seaboard Territory to the Missouri River Cities, would no longer "break" equally for all shippers at the Mississippi River; that while on such shipments the eastern carrier would collect the same charge which it imposed on all similar shipments from the Atlantic Seaboard to the Mississippi River, the western carriers would be compelled to haul these goods from the Mississippi River to the Missouri River Cities at a lower rate than their tariff rates for the transportation of similar merchandise between said rivers when the other shipments originated at any point west of Buffalo or Pittsburg.

The order of the Commission would, therefore, if enforced, work a complete change in the rate system above described, and would enable merchants at New York and the Missouri River Cities, to have their goods transported from the seaboard to the Missouri River Cities, at a lower rate than would be charged the wholesale merchants at St. Louis, Chicago and the cities west of Buffalo and Pittsburg for shipping a like amount of merchandise from the seaboard to the Mississippi River and thence to the Missouri River Cities.

As we have shown, the effort on the part of the Missouri River wholesale merchants in the proceeding mentioned, before the Commission, was to obtain, through a readjustment of rates, an advantage over their competitors at Chicago and St. Louis and other cities; and the order of the Commission was designed to carry out the said purpose and establish the said advantage.

** *

That the purpose of the Commission, in making the order in question, was to overthrow the existing rate system and compel the railroad companies operating between the Mississippi and Missouri Rivers, to make a lower charge for the transportation of merchandise between said rivers when the same originated in the Atlantic Seaboard Territory, than is to be made for the transportation of like merchandise when shipped by merchants at Chicago or St. Louis, is made clear by the Annual Report of the Interstate Commerce Commission for the year 1908, an extract from which was offered in evidence and will be found in the Transcript case 663, at page 469. In this report, the Interstate Commerce Commission, speaking of the order made in this case, said:

"Suits by carriers to annul orders of commission.

"Chicago, Rock Island & Pacific Railway Company v. Interstate Commerce Commission. Northern District of Illinois. The Commission ordered carriers between Mississippi and Missouri Rivers to apply rates somewhat lower upon traffic originating at the Atlantic seaboard than were applied to the same kinds of traffic when originating at the Mississippi River, recognizing the familiar rule that the through rate for the long haul should be less than the sum of the locals for the two short hauls. A temporary injunction has been granted."

* * *

As the order condemned by the decree in Case Number 663 was entered for the purpose of destroying the system by which rates break equally for all shippers at the Mississippi River, so the order suspended by the interlocutory decree in Case Number 641, was entered for the purpose of destroying the rate system whereby rates break equally for all shippers at the Missouri River.

The order in Case Number 641 was entered in a proceeding begun by George K. Kindel, a manufacturer of Denver, complaining, among other things, that the rates charged for the transportation of merchandise to the city of Denver

from New York, Chicago and St. Louis and from the Missouri River Cities, were excessive and discriminatory. In its opinion, the Commission, after a discussion showing that the controversy was one really between communities, said (Transcript case 641, pp. 33-34):

"In the Burnham-Hanna-Munger Case supra, we decided that the Missouri River cities were entitled to through rates from eastern points lower than the combination on the Mississippi River basing line. * * * Following the principle there established, we think that here, the class rates from Chicago to Denver and from St. Louis to Denver, should be less than the sums of the local rates based on the Missouri River."

The order of the Commission, therefore, made no change in the rates between the Missouri River Cities and Denver, but ordered the carriers to put in rates from Chicago to Denver and from St. Louis to Denver, materially lower than the sum of the rates from Chicago and St. Louis to the Missouri River Cities and from those cities to Denver. This order of the Commission would, therefore, if enforced, work a complete change in the rate system above described, and would enable merchants at New York and at Chicago and St. Louis to have their goods transported to the city of Denver at a lower freight charge than merchants upon the Missouri River would be compelled to pay for shipping like amounts of similar merchandise from the same points of origin to their warehouses and thence to the city of Denver.

In the bill filed in Case Number 641 (Transcript p. 13), the averment as to the purpose of the Commission is as follows:

"That the said order was made by said Commission for the express purpose of destroying the Missouri River as a basing point in the making of rates from Chicago, St. Louis and eastern territory to territory west of the Missouri River, including said city of Denver, and your orators aver and charge the fact to be that the said commission, in making said order, did so, for the express purpose of making a general readjustment of rates for transportation of merchandise to and into central and western territory and for the express purpose of destroying the system upon which all transportation rates have heretofore been made to and into said territory, namely, the system of basing such rates on the Mississippi River and on the Missouri River as basing points; and for the purpose of substituting in place of the system which has heretofore prevailed and upon which all business and commercial interests in said territory have grown up and are now established a system of making through rates regardless of basing lines, and lower than the rates to and from basing points."

There is no answer filed in the case, the pleading of the Commission being a demurrer. This averment stands admitted on the record, the bill being verified.

The enforcement of the two orders condemned by the decrees now in question would work a complete revolution in the entire rate structure of the west, by abolishing the present rate structure which affords equality of opportunity in competition to the various commercial centers, and substituting therefor, an artificial system by which certain localities are given special advantages over their competing localities in the matter of freight charges.

** *

If any lingering doubt exists as to the comprehensive purpose of the Commission, in the orders in question, it will be entirely removed and the object of the Commission clearly appreciated by a consideration of a later decision by that body.

The case of Indianapolis Freight Bureau v. Cleveland, Cincinnati, etc., Railway Co., et al., reported in Vol 16 I. C. C. Rep. 56, was decided after the decisions in the Burnham-Hanna-Munger Case and the Denver Case. The complaint in that case was as to the charges imposed for the transportation of merchandise from Indianapolis to the Missouri River Cities, Kansas City and Omaha. As the Commission states, the rates from Indianapolis to the Missouri River Cities were the rates made by the eastern railroads from Indianapolis to St. Louis added to the rates made by the western railroads from the Mississippi River to the Missouri River Cities. we have stated, the rates charged for the transportation of merchandise from the Mississippi River to the Missouri River Cities, are the same for all shippers; and the shipper at Indianapolis paid the same sum for the transportation of his merchandise from St. Louis to Kansas City or Omaha, as was paid for the transportation between those cities of similar merchandise by shippers at St. Louis, Cleveland, Buffalo, New York or Boston. The Commission referred to its decision in the Burnham-Hanna-Munger Case, and its condemnation of the practice whereby the western railroads charge the same sum for transportation, between the rivers, of merchandise destined to the Missouri River Cities, whether the same originated at St. Louis or any eastern city; the new principle, announced by the Commission, that the rates for the transportation of merchandise destined to the Missouri River Cities between the Mississippi and Missouri Rivers by western railroads, should be different when the same were shipped from different eastern cities, was applied. The Commission said (16 I. C. C. Rep., pages 62-64):

"What was there (in the Burnham-Hanna-Munger Case) found and said as to the unreasonableness of exacting the full local rates west of the Mississippi River as portions of the through rates applies also and with equal force to the situation now before us. * * * Indianapolis is nearer to the Missouri River than is the Atlantic Seaboard, and following a well recognized and sound principle of rate-making, the rates applied to the Indianapolis traffic for the haul from the Mississippi River to the Missouri River as parts or portions of the through rates should be more than on traffic from the Atlantic Seaboard."

The Commission stated as its conclusion in that case, that the maximum rates for the haul from the Mississippi to the Missouri River on shipments from Indianapolis to the Missouri River Cities, should be as follows: 55 cents first class; 41 cents second class; 32 cents third class; 25 cents fourth class, and 20 cents fifth class.

In view of the fact that the order of the Commission in the Burnham-Hanna-Munger Case was under injunction and was before the Court for review in Case Number 663, and recognizing that the decision in that case would control with respect to any order made to enforce the conclusions in the Indianapolis Case, the Commission (p. 71), did not make any order at the time of the decision, to enforce the same, but held the case open for that purpose.

We have, therefore, in the decision of the Commission in the Burnham-Hanna-Munger Case (under review in Case Number 663), and in the decision in the Indianapolis Freight Bureau Case *supra* a clear expression of the Commission's purpose and intent.

In the Burnham-Hanna-Munger Case, the maximum rate fixed by the Commission for the transportation of merchandise from the Mississippi River to the Missouri River Cities, was fixed at 51 cents, first class, on goods shipped from the Atlantic Seaboard. In the Indianapolis Freight Bureau Case, the maximum rates for the transportation between the Mississippi River and Missouri River cities, were fixed by the Com-

mission at 55 cents, first class, on goods shipped from Indianapolis. There was a corresponding difference in the rates for the other classes. And this difference in the rates to be charged by western railroads for the transportation of similar merchandise, between the rivers, was established because Indianapolis "is nearer to the Missouri River than is the Atlantic Seaboard."

St. Louis is nearer the Missouri River than is any city east of the Mississippi; and, therefore, under this new principle of the Commission, the rates to be charged the St. Louis merchant for transporting goods from St. Louis to Kansas City or Omaha, must be higher than the rates charged for the transportation between St. Louis and Kansas City or Omaha, of similar merchandise which may have been carried into St. Louis by some eastern railroad from some eastern city. Therefore, the rate to be charged by the railroads beginning in St. Louis and ending in Omaha, for the transportation over their lines, must vary, being dependent upon the location of the city at which the eastern railroad received the shipments.

* * *

It must be remembered, in this connection, that there are no joint rates published by the railroads for the transportation of merchandise from points east of the Mississippi River to the Missouri River Cities. On the contrary, the only published tariffs applicable to such traffic are the separate tariffs of the eastern railroads fixing the charges for the transportation of the merchandise to the Mississippi River, and the separate tariffs of the western railroads for the transportation of the merchandise between the Mississippi and the Missouri River Cities.

Moreover, a further fact established by the uncontradicted testimony in the record in this case, should be borne in mind. While goods are in fact carried under these separate tariffs on through bills of lading from the east to the Missouri River Cities, yet the cost to the western railroad companies of handling such traffic is in every case as great and in very many cases greater than is the cost to such railroad companies of handling goods shipped from St. Louis or Chicago to the Missouri River Cities. (See testimony of witnesses Eicke, p. 122, Frank L. Johnson, p. 135, C. J. McPherson, p. 265, and J. E. Taussig, pp. 287-330 Transcript in Case Number 663.)

* * *

It should also be borne in mind, in this connection, that under the decisions of the Interstate Commerce Commission cited, because of the attempted establishment of the new principle in rate-making by the Commission, the railroad companies would be powerless to make any reduction in their rates so as to preserve the present system. As was said, in the Burnham-Hanna-Munger Case, they were ordered to reduce their charges for the transportation between the rivers on merchandise shipped from the Atlantic Seaboard to the Missouri River Cities from 60 cents, first class, to 51 cents, first class. If the railroad companies attempted to reduce their first class rates for the public generally for the transportation of merchandise between the rivers to the Missouri River Cities to the sum of 51 cents, they would be met by the decision of the Commission in the Indianapolis Case fixing the rate for such transportation on merchandise from Indianapolis at the sum of 55 cents first class. And they would violate the principle sought to be established by the Commission and clearly announced in the Indianapolis Case; namely, that where cities are located nearer the Missouri River than the Atlantic Seaboard Territory, rates between the rivers on merchandise from such cities, must be higher than the rates for such transportation on shipments from the Atlantic Seaboard; and they would violate the principle, reiterated by the Commission, that it is unreasonable for the western carriers to apply their local rates on through shipments.

. .

It is quite clear, from the foregoing, that the Commission, in the orders in question, was not acting upon a single rate, but upon a relation of rates. That body did not take up the tariffs of the western roads fixing for all shipments to the Missouri River Cities the charges for the transportation between the Mississippi River and the Missouri River, and lower those tariff charges for all shipments. On the contrary, the Commission condemned the principle or practice of charging, on all such shipments, the same rate for the transportation between the rivers. The railroad beginning at St. Louis and ending at Omaha now charges for the transportation of a given kind and quantity of merchandise over its line, between said cities, the same sum, whether the shipment is delivered to it by a merchant at St. Louis, or is delivered to it at St. Louis by an eastern road which carried it from Indianapolis or New York. This practice is forbidden by the Commission; and the railroad is ordered to vary its charges for transporting like amounts of similar merchandise over its line at the same time, the same distance, and to graduate these charges according to the point at which the eastern road received the The charges for the transportation of merchandise from Chicago or St. Louis to the Missouri River Cities and from those cities to Denver, is the same for the Missouri River merchants as it is for the shipper at Chicago or St.

Louis. This practice is condemned by the Commission; and the railroads are ordered to make the charges for transportation from Chicago or St. Louis to Denver lower than the charges for transportation to the Missouri River Cities and from those cities to Denver. As was said, the Commission did not disapprove a particular tariff rate; it disapproved the present relation of rates, and ordered, as a substitute, a new and different relation.

The Interstate Commerce Commission has, under the Act to Regulate Commerce, no delegated authority to condemn rates and practices which are in conformity to the Act and therefore valid.

The Congress of the United States, in the Interstate Commerce Act, has prescribed the standards of legal rates. It is provided in section I that all charges of the carriers shall be just and reasonable. It is provided in section 2, that the charges of the carriers shall not differ, as between different shippers, for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, thus prohibiting unjust discrimination. It is provided in section 3, that no undue or unreasonable preference or advantage shall be given to any person, locality or particular description of traffic, and that no person, locality or description of traffic be subjected to undue or unreasonable prejudice or disadvantage. Section 4 contains the long and short haul clause which has no bearing upon the controversy. It follows from this affirmative legislation of Congress, that rates which are just and reasonable, and which are not unjustly discriminatory, and which are not unduly preferential or prejudicial, are lawful and legal rates.

After definitely and affirmatively fixing the standards of legal rates as above mentioned, Congress, in the Act to Regulate Commerce, left the initiative in the matter of promulgating rates with the railroad companies, providing for the publication, posting and filing of all tariffs.

The Interstate Commerce Commission was created by the Act, but its delegated authority in the matter of forbidding rates and practices was limited. The Commission was given no power to initiate rates. The Commission's power to con-

demn a rate and to prescribe a substitute is given by section 15 of the Act to Regulate Commerce. That section provides that the Commission may so act on rates "whenever, after full hearing upon a complaint made as provided in section 13 of this Act, or upon complaint of any common carrier it shall be of the opinion that any of the rates or charges whatsoever demanded, charged or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act."

The words "unjust or unreasonable" in section 15 clearly relate to section 1 of the Act; the words "unjustly discriminatory" of said section, pertain to section 2 of the Act; the words "unduly preferential or prejudicial" relate to section 3 of the Act.

It is clear, from this section, that the action of the Commission in condemning a rate and prescribing a substitute is limited to those instances wherein, after full hearing upon complaint, the Commission is of the opinion that the rates or practices complained of, are in violation of the Act.

Does the mere announcement, by the Interstate Commerce Commission, of an opinion that a given rate or practice of a carrier is in violation of the statute, necessarily conclude the question as to the power of the Commission to condemn such rate and practice and prescribe a substitute therefor?

"Whether a given statute is intended simply to establish a rule of substantive law and thus to define the duty of the court, or is meant to limit its power, is," said this Court in Fauntleroy v. Lum, 210 U. S. 230 (235), "a question of construction and common sense."

The Interstate Commerce Commission is an administrative body dealing with property rights and acting "by way rather of fiat than of adjudication." This fact has an important bearing upon the construction of the statute.

Taking the entire Act and its purpose and object into consideration, we submit that, as a matter of "construction and common sense," it was the intention of Congress that the delegated power of the Interstate Commerce Commission in the matter of rates and practices exists only with reference to those cases wherein, in fact and in law, the rates or practices of the carriers fail to comply with the requirements of the statute.

As has been said, Congress, in the Act to Regulate Commerce, has fixed the standards of legal rates. Rates and practices which are just and reasonable, which do not unjustly discriminate and which do not result in any undue or unreasonable preference or advantage or in any undue or unreasonable prejudice or disadvantage, are, by the legislation of Congress, declared to be legal rates and practices.

By leaving with the carriers the initiative in the matter of establishing rates, it was clearly the intention of Congress that the power of the Interstate Commerce Commission should be corrective, merely. If a rate or practice of a carrier is in fact and in law in conformity to the standards fixed by Congress then there is no need of correction in that regard, and of course no such power was intended to be delegated. Power to correct a lawful rate is a power to make it accord with the will of the Commission, not the legislative will of Congress. Such a power implies the right of the Commission to establish standards of rates at variance with those fixed by the Act. It could not have been the legislative intent that the Commission have the delegated power to condemn a rate or practice which, in fact and in law, conforms to the standards which Congress has prescribed as determining the legal rates.

It is manifestly contrary to the purpose of the statute to hold that a mistaken opinion of the Interstate Commerce Commission should overturn the legislative will that all rates and practices of the carriers must conform to the standards which Congress has established in the Act to Regulate Commerce.

The fact that Congress provided that the Commission should exercise its corrective function when, after a hearing, that body was of the opinion that the rate or practice under investigation was in violation of the statute, does not tend to show a legislative intent that such opinion should be conclusive. Whether those words were in the Act or not, the result would necessarily be the same. As the standard of legal rates was prescribed by Congress, it would follow, whether so expressed or not, that an opinion by the Commission that a particular rate or practice was in violation of the statutory requirement, would be a necessary predicate of any action by that body in condemning the rate or practice.

The Act provides that the Commission may establish through routes and joint rates where no reasonable or satisfactory through route exists. Manifestly, the Commission must in the case of the exercise of this power be of the opinion that no reasonable or satisfactory through route exists. But its opinion is merely for its own guidance and cannot create a power where none exists. If, in truth, a reasonable and satisfactory through route does exist, then the Commission has no power to establish a through route and joint rate. A Court, in determining the power of the Commission in such a case, must decide the question whether a reasonable and satisfactory through route exists.

So where Congress has fixed the standards of legal rates, and limited the Commission to corrective action upon the rates established by the carriers, it is clear that the Commission has no power to make an order compelling an abandonment of a legal and lawful rate. When an order of the Commission

condemning a rate or practice is being attacked, the legality of the rate condemned must be inquired into by the Courts to determine whether such order is within the power of the Commission.

If the Interstate Commerce Commission, under a misconception of the law, condemns a rate which is legal, the act of the Commission is beyond its powers and is void; and its order will be set aside by the Court. This has been definitely decided.

Interstate Commerce Commission v. Stickney, 215 U. S. 98.

Southern Ry. Co. v. St. Louis Hay Co., 214 U. S. 297.

We submit that if the Interstate Commerce Commission under a misconception of the facts condemns a rate or practice which does in truth and in fact conform to the standards fixed by Congress, its act is beyond its power and the order will be set aside by the Court.

We maintain, therefore, that the Act to Regulate Commerce should not be construed as intending to vest in the Commission the final determination of those questions of fact upon which depend the legality of the established rates or practices.

To hold otherwise, would make the statute conflict with the Fifth Amendment to the Constitution. Railroad Companies, under the statute, have a right to rates which are in conformity to the standards established by Congress. If this right to charge a legal rate is taken away from a carrier by the Commission, and the statute is so construed as to prevent a Court from inquiring into the fact, then the carrier is deprived of its right without due process of law.

This question was presented to and decided by this Court in the case of Chicago, etc., Railway Company v. Minnesota,

134 U. S. 418. In that case, the Court had before it a statute of Minnesota which provided that all rates of railroad companies for transportation within the state should be equal and reasonable. A Commission was created, which was given power, whenever it should "find that any part of the tariffs of rates" were "in any respect unequal or unreasonable" to compel the offending carrier to change the same and adopt the rate which the Commission should find to be equal and rea-The Commission found a certain rate on milk, sonable charged by a carrier, to be unequal and unreasonable; it entered an order compelling an abandonment of the rate and directed that a tariff fixed by the Commission should be substituted therefor. In a suit to enforce the order of the Commission, the State Court held that the finding of the Commission was not merely advisory, but final and conclusive; and that, in the court proceeding, there was no fact to traverse except the violation, by the carrier, of the order of the Commission. This Court held the statute, so construed, to be in violation of the Federal Constitution. This Court said (pages 456-7):

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The basis of the decision was the fact that the railroad company had a property right to charge a rate which conformed to the standards prescribed by the law; and that any taking away of this right without opportunity for investigation by a Court into the facts, was taking property without due process of law. This Court further said (page 457):

"By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation."

This Court further said (page 458):

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States."

In Missouri K. T. Ry. Co. v. Interstate Commerce Commission, 164 Fed. 645, speaking to the point now under consideration, the Court said (p. 648):

"Power to determine and prescribe what are just and reasonable maximum rates to be charged in interstate commerce is, in a limited way, conferred upon the Interstate Commerce Commission by existing statute law; but, as the commission acts only as a legislative or administrative board, and not judicially (Western Union Telegraph Co. v. Myatt, C. C. 98 Fed. 335, 344), its determination or action does not, and cannot preclude judicial inquiry into the justness and reasonableness of the rates, within the meaning of the constitutional guaranty, for that is a judicial question."

* * *

In the administration of certain departments of the government, such as the land office, the post office, the immigration bureau and others, certain findings of fact made by the department in the course of its business may, by law, be made conclusive. But these departments are not dealing with property rights. The Interstate Commerce Commission is dealing with property rights. The right of the railroad companies to apply to a Court and have its adjudication upon the question whether their property rights are invaded by any order of the Commission, inheres in the "due process of law" guaranteed by the Federal Constitution. This distinction between the findings of the Commission, and those of the departments mentioned, has been clearly stated by the Court in Missouri, Kansas & Texas R. R. Co., et al., v. Interstate Commerce Commission, 164 Fed. 645 (648).

* * *

It is clear that the Commission has no delegated arbitrary power over rates. Each railroad company owns its own property and has a property right in the legal use of the same. As long as all its rates and practices are in conformity to law, the company may manage its property as it sees fit. When a choice of two policies, both lawful, is offered, the company has a legal right to adopt either. The establishment of practices within the statutory regulations is for the man-

agement of the carrier to determine. The Commission cannot interfere to change practices which are legal and thus invade the province of railroad management. As was said by this Court in *Interstate Commerce Commission v. Chicago Great Western Railway Co.*, 209 U. S. 108 (page 118):

"It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in Int. Com. Com. v. Ala. Mid-R. R. Co., 168 U. S. 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in Int. Com. Com. v. B. & O. R. R. Co.,

43 Fed. Rep. 37, 50:

'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

In Railroad Company v. Smith, 173 U. S. 684, speaking of the property right of railroad companies in the management of their affairs, this Court said (page 697):

"What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them

to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

The present rate structure of the west, which the Commission seeks to destroy, conforms to the standards of legal rates fixed by Congress in the Act to Regulate Commerce, and violates none of the provisions of the law.

We have already shown that the orders in question herein were entered in controversies between competing localities, and for the purpose of readjusting the relation of rates, in order that advantages, not enjoyed under the present system, should be accorded to certain localities as against their competing localities.

The only section of the Interstate Commerce Act which deals with the relation of rates to different localities, is section 3. Therefore, the inquiry is whether the rate adjustment, condemned by the Commission, in any wise gives to any locality any undue or unreasonable preference or advantage or subjects any locality to any undue or unreasonable prejudice or disadvantage.

In the order in the Burnham-Hanna-Munger Case, the only rates which the Commission saw fit to modify, were the rates of the western carriers operating between the Mississippi and Missouri Rivers; and those rates were modified only as to the shipments originating in the Atlantic Seaboard Territory. We have already called attention to the fact that the rates fixed for the transportation between the Mississippi and Missouri Rivers are not parts of joint rates from the Atlantic Seaboard to the Missouri River, but are entirely separate rates which apply on all business from the Mississippi to the Missouri River Cities. In the bill filed in Case Number 663 it is averred (Transcript case 663, page 5):

"Your orators further aver that the said rates and charges for the transportation of merchandise between the points on the Mississippi River aforesaid and the said Missouri River points, were not established by your orators as a part of joint through rates, and were not established by your orators to be specially applied to through transportation of merchandise from points on the Atlantic Coast to said Missouri River points; but, on the contrary, your orators aver that the said rates were established by your orators for the transportation of all merchandise carried by your orators between said points regardless of the point of origin of such shipments."

This averment of the bill was specifically admitted to be true by the answer of the Commission (Transcript case 663, p. 51).

Moreover, it is entirely uncontradicted and established by the record, that the tariffs of the eastern railroads for the transportation of merchandise from the eastern territory to the city of St. Louis, are not established as parts of joint rates, but are established to be applied to all shipments of merchandise between said points.

Merchandise transported from the Atlantic Seaboard Territory to the Missouri River Cities, whether carried on through shipments or whether carried to St. Louis and afterwards re-shipped to the Missouri River, is carried by eastern railroads on rates established and received by eastern railroads; and the western railroads have no part or concern with the establishment or enjoyment of such rates. The rates paid for the transportation of such merchandise from the city of St. Louis to the Missouri River Cities, are fixed and received by the western railroads; and the eastern railroads have nothing whatever to do with the establishment or enjoyment thereof.

We have already shown how this rate system affects the commercial conditions of the respective localities concerned therewith. The only advantage which could be or was asserted as being enjoyed by St. Louis as against the merchants of the Missouri River Cities, was that merchants of St. Louis could ship from the Atlantic Seaboard, merchandise to their warehouses in St. Louis, and afterwards re-ship the same to the Missouri River Cities, paying for the transportation of such merchandise, the same freight charge that was paid by a New York merchant or a Missouri River merchant for transporting a like amount of similar merchandise between the seaboard and the Missouri River Cities. In other words, as has been said, the advantage in favor of St. Louis which is asserted as inhering in the present system, is that the merchants at that city have enjoyed an equality of opportunity in competition, so far as freight charges are concerned, with their competing merchants in the east and their competing merchants in the west.

We can see no possible theory to justify a claim that this equality of opportunity in competition is an undue or unreasonable preference or advantage in favor of St. Louis or an undue or unreasonable prejudice or disadvantage to the Missouri River Cities.

Although the matter was not referred to in the opinion of the Commission, the railroad companies, in the testimony to which we have already called attention, have established, without contradiction, the fact that whenever there is a difference to the western railroad company in the expense of handling merchandise delivered to it at St. Louis, the expense to the western railroad is greater in the case of shipments delivered to it by the eastern carrier than in the case of similar shipments delivered to it at St. Louis by a local merchant.

The western railroads which begin at St. Louis, begin their service in the transportation of all merchandise in question, at the city of St. Louis; and that service consists in transporting the merchandise to the Missouri River Cities. The service is the same, in the case of shipments delivered to them at St. Louis by the merchant there, as it is in the case of a like amount of similar merchandise delivered at St. Louis by the eastern carrier; their charge in each case is the same. We submit that equality of charge for identity of service is legal and not unduly preferential.

Moreover, the present rate system is natural and normal. What could be more natural and normal than that the rail-roads operating between St. Louis and Omaha should charge for the transportation of merchandise over their lines, between those cities, the same sum in all cases of like and contemporaneous shipments?

The present rate structure, condemned by the Commission, being natural and normal, its basis being equality of charge for identity of service, and its commercial consequence being to give to the various localities an equality of opportunity in competition, can on no rational theory be held to be in violation of section 3 of the Act to Regulate Commerce.

* * *

The considerations urged as establishing the validity of the rate system condemned in the Burnham-Hanna-Munger Case, apply with equal force to the rate system condemned by the order in the Kindel or Denver Case. The only difference in the two cases merely serves to emphasize the considerations here presented. There are railroads which now extend continuously from Chicago and from St. Louis to Denver, crossing the Missouri River at Omaha and Kansas City. These railroads originally terminated at the Missouri River Cities. By the time these roads were extended beyond those cities to Denver, the commerce of the Missouri River Cities, in the distribution of merchandise and supplies, had become extensive. Many enterprises had been established and much money invested in those cities in reliance upon the equality of oppor-

tunity in competition which inhered in the rate system in effect. When these roads were extended to Denver, it was seen that to make their through rates from Chicago and St. Louis to Denver less than the sum of the locals based on the Missouri River, would be to deny to those cities the equality of opportunity which had always been theirs. The roads which extended to those cities from the east and there terminated, and the roads beginning at those cities and extending westward, were committed to the prevailing system. Thus commercial and competitive conditions compelled the roads in question to maintain the system by making their through rates from Chicago and St. Louis to Denver, equal to the sum of the locals based on the Missouri River. This fact comes to this Court established by the record. In the bill in the Denver Case (Transcript case 641, p. 9), the averment is as follows:

"Your orators further aver that long prior to the construction of any railroad westward across the Missouri River to the city of Denver, the said Missouri River had been made a basing point in the making of rates to the territory west of said Missouri River, and that, as is above stated, for many years the only railroads serving the said Missouri River cities were lines of railroad entering said cities from the east and terminating there, and lines of railroad beginning at said cities and extending west therefrom, and that at the time the said four lines of railroad of your orators, the Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the Missouri Pacific Railway Company, and the Atchison, Topeka & Santa Fe Railway Company, were constructed west of and across the said Missouri River to the city of Denver, or other Colorado common points, the said Missouri River cities and the commercial interests therein had become extensive and important and the competition with the railroads whose lines terminated at said Missouri River cities had become so active and the competition between the several distributing points on said Missouri River and east thereof had become so extensive and important that the said four companies whose lines were extended across said

river and westward therefrom were compelled, by reason of commercial and competitive conditions to recognize, adopt and apply at said Missouri River cities the said system of basing rates on the Missouri River which had always theretofore obtained as hereinabove set forth."

This averment is not traversed, the Commission's pleading being a demurrer. The bill is verified.

We submit, therefore, that the Interstate Commerce Commission, if it overturned the present rate structure on the assumption that said rate system gave undue or unlawful preference or advantage to certain localities, misapplied the law, and condemned a lawful rate structure, and its orders are void.

* * *

It should be borne in mind, in this connection, that while there is no joint rate from the eastern cities to the Missouri River Cities, merchandise may be billed through from the Atlantic Seaboard to the Missouri River Cities, on the separate rates; therefore, there is a reasonable and satisfactory through route between the Atlantic Seaboard and said cities, and hence no power in the Commission to compel joint rates.

If any railroad, east or west, fixes, for transportation to different points on its line, rates which unduly prefer one point over the other, then such company violates section 3 of the Act to Regulate Commerce, and the Commission may condemn the practice. If several carriers join in establishing joint rates which unduly prefer one locality over another, the companies, so joining in such rates, violate section 3 of the Act and the Commission may condemn the rates. But the mere refusal of one carrier to join in establishing a joint through rate lower than the local rates, when the carrier is under no legal obligation to unite in such a joint rate, cannot

be a violation of law; and a failure to realize a commercial advantage over competing localities which would follow the establishment of such a joint through rate, is not an undue or unreasonable prejudice or disadvantage forbidden by said section 3.

* *

Of course it cannot be claimed that the present rate structure violates section 2 of the Act by unjustly discriminating between shippers. The essential feature of the rate structure is equality of charge to all shippers for the transportation between the rivers.

* * *

It is clear that if the Commission did enter the orders in question on the theory that the rates in question violated section I of the Act, that body misconceived the law. It is true that the Commission found that the rates between the rivers. as applied to shipments from the Atlantic Seaboard Territory, were "too high." But they were held to be "too high" only when used as a factor in ascertaining the aggregate charge on through traffic. It is beyond question that this finding was predicated upon the new and arbitrary rule sought to be enforced by the Commission to the effect that the rates between the rivers should vary with the point of origin of the shipments. The Commission held in the Indianapolis Case that as Indianapolis is nearer the Missouri River than is the Atlantic Seaboard, its rate between the rivers should be higher than that of the seaboard. On this principle to apply on seaboard shipments the same rates that were charged on Indianapolis shipments for transportation between the rivers, was to charge on seaboard shipments a rate "too high." On this principle to charge on all shipments between the rivers, the

same rate, was to charge "too high" a rate on all shipments originating east of St. Louis.

But this is not the result of applying the considerations which determine the reasonableness, per se, of railroad rates. It involves merely the relation of rates. It is not the finding of a fact, but the statement of an imposed obligation. It is merely the assumption of a right to compel the adoption of the so-called principle. To say that the rate for transportation between the rivers is "too high," only when used as one figure in the sum constituting the aggregate charge on seaboard shipments, is merely to announce a rule that the rates for transportation between the rivers applied on through traffic should be less than the rates for like transportation applied on traffic originating at the Mississippi River. As this rule has no foundation in legal obligation, the conclusion that the rates as parts of the aggregate charge on through traffic, are "too high" has no valid basis.

The Commission did consider the tariff rates between the rivers and expressly declined to lower them on traffic generally. "The local rates between the rivers," said the Commission (Transcript case 663, p. 33), "are high, but this is not the time to precipitate such a violent change as would follow an important reduction of them." To say that rates are "high" falls far short of expressing the opinion that they are unjust or unreasonable, and, therefore, in violation of section 1. "The carrier is entitled," said this Court in Interstate Commerce Commission v. Stickney, 215 U. S. 98 (page 105), "to have a finding that any particular charge is unreasonable or unjust before it is required to change such charge." When the Commission spoke of the rates between the rivers, as applied to seaboard shipments, it found the rates "too high;" while, speaking of the rates as applied to shipments originating at the Mississippi River, it declined to find them unreasonable and stated as its opinion that any material reduction thereof would be unwise.

Therefore, even if the orders in question are claimed to be based upon the theory that the Commission found the rates "too high" and therefore unjust or unreasonable and in violation of section 1, it is apparent that the Commission, in such case, misapplied the law and condemned a legal rate. As the western railroads are under no legal obligation to charge for transporting merchandise between the rivers, a smaller sum on shipments originating east of St. Louis than they charge for like transportation originating at St. Louis, any finding and order of the Commission, based on such a theory, embodies a misapplication of law, and is void.

The Commission did not pass upon the reasonableness per se of the rates from the seaboard to St. Louis. The opinion makes clear the fact that that body did not construe the complaint of the Missouri River jobbers as calling for such action, although the published tariff rates on all seaboard shipments from the seaboard to the Missouri River Cities were involved. If the complaint had called in question the reasonableness of those rates, in and of themselves, then any warranted reduction of the rates from the seaboard to the Mississippi River would be in line with the complaint and should have been granted. But the Commission (Transcript case 663, pp. 31-32) said (the italics are ours):

"It seems patent that any change in the rates east of the Mississippi River even if warranted, would fail to accomplish what the complainants desire, because whatever of advantage accrued therefrom to the Missouri River Cities, would accrue to a like degree or extent to their principal competitive commercial centers, to-wit: New York, Chicago, St. Louis and the Twin Cities." Even if the orders of the Interstate Commerce Commission could be referred to some delegated power of that tribunal, nevertheless they evince such an unreasonable exercise of that power, as to make the Commission's action, in truth, the exercise of a purely arbitrary and absolute power over the railroad rates and practices and over the commerce of the country, and therefore void under the elementary rule that the substance and not the shadow determines the validity of the exercise of the power.

I. The action of the Commission is arbitrary, because it is revolutionary. It is not corrective, because no violation of law inheres in the present system. The Commission's action is an attempt to initiate, for the west, an entirely new system of rate-making. For the purpose of readjusting commercial conditions, the action of the Commission overturns the system of rate-making which has always obtained throughout the entire western and southeastern portions of the United States.

To make this fact clear, we have prepared and introduced in evidence in this case, a large and comprehensive map which shows the rate structure of the territories mentioned. The map is complainant's exhibit "E" and it is fully and satisfactorily explained in the testimony of E. B. Boyd (Transcript case 663, p. 429). The map will be found on page 1041 Transcript case 663. This map shows that, with trifling exceptions, (for each of which a specific cause is given), the entire country from the Mississippi River west, north of the south line of the state of Kansas, is and always has been served by rates which are combinations of local rates. It also

appears (Transcript case 663, pp. 430-431) that the southeastern territory is and has been served by rates which are combination rates; the sum of the rate to a basing point and the rate from such basing point to destination, being the rate charged. There are more than 45 of such basing points in the southeast.

A clear statement, based on public tariffs, concerning which no dispute is possible, of the extent of western territory within which this combination of rates has always obtained, will be found in the testimony of Mr. Boyd (Transcript case 663, p. 668), as follows:

"Q. To get at the matter more in detail, I wish you would state concisely where the rates break on merchandise from the east going west?

"A. I will state it amplifying the map that we filed. On traffic from points east of the Illinois and Indiana state line the rates break at the Mississippi River for points in Missouri, points in Iowa, points in Nebraska, Kansas, Wyoming, Colorado, Utah and There are some few exceptions like the Lincoln-Fremont differential territory in Nebraska and the percentage group in Kansas, and Spokane, which is the northern corner of Idaho and which is really in what is involved as Pacific coast affected territory. The rates on the same traffic break again at the Missouri River for points in Nebraska, Kansas, Wyoming, Colorado, Utah and Idaho, with the same exceptions. And in both cases in Nevada until the combination from Sacramento comes back. The rates break on the same traffic, that is from the east I am speaking of, at Chicago for all points in Wisconsin, at Chicago or Lake Michigan ports for all points in Wisconsin other than Eau Claire, Chippewa Falls and La Crosse, and a few points in what is known as the Milwaukee territory, which is a narrow zone about forty miles wide, running from the Illinois-Wisconsin border to Milwaukee and then a strip up to Sheboygan of about ten miles Those are lake ports practically. They do wide. not break on the lake ports for that lake port. They

cannot break on a point for itself. Another exception is the head of the lakes, Duluth and Ashland and so forth. They break at Chicago for all points in central and southern Minnesota, all points South Dakota except Sioux Falls and a few intermediate points, fifteen in number, because Sioux Falls is immediately contiguous to the territory of Iowa, and is affected by Missouri river conditions. They break also on Chicago for the Missouri river excepting as to second class and to points west of the Missouri river not excepting the Lincoln and the Fremont differential territory and the southeastern percentage group points. They break at St. Paul and Minneapolis for points in northern Minnesota, points in South Dakota, points in Montana. they strike the affected Pacific coast territory. traffic originating at Chicago and in Illinois and at St. Louis and on the Mississippi river and in Iowa and in Missouri and at St. Paul and Minneapolis they break at the Missouri river for all points west thereof in the states of Nebraska, Kansas, Wyoming, Colorado, Utah, Idaho and Nevada, with the same few exceptions given previously. They break again at Denver and Colorado common points when originating at or east of the Missouri river, for all points in Colorado west of Colorado common points and for points in Utah until they are affected by the Utah rate. They break again at Salt Lake for points in southwestern Utah and for points in Nevada until you strike the Pacific coast coming back. They break at all Pacific coast terminal points such as Los Angeles, San Diego, Sacramento, San Francisco, Stockton, Portland, Seattle, Tacoma, back into the interior of Oregon, Washington, California and in Nevada. New Mexico and Arizona.

[&]quot;Q. That covers the rate structure as it applies to merchandise shipped west?

[&]quot;A. Yes sir.

[&]quot;Q. Now what is the character of the rate structure of the articles produced in the west and shipped east? Take grain for instance?

[&]quot;A. The rates on grain from points west of the Missouri river break at Missouri river points when destined

to points east thereof to and including the Atlantic Seaboard. They break again on that same traffic at Mississippi river points, or I will say at St. Louis for there are no grain markets at other points, or they break at Chicago for the same territory, and through another form Detroit, Toledo, Sandusky, Cleveland, Indianapolis, Mansfield, Akron or any other point where there is an elevator.

"Q. So that there are no rates on grain from points of production west of the Missouri river to the Atlantic seaboard that are lower than the sums of the rates

to those intermediate points and on?

"A. No sir. On traffic originating in Missouri they break at St. Louis. Traffic originating in northern Missouri and in Iowa where they are reached by Chicago lines they break at Chicago. From South Dakota they break at Chicago. From Minnesota, they break at Chicago and at St. Paul and Duluth. And they break at Lake Michigan ports north of Chicago.

"Q. Now this rate system that you have detailed, both on merchandise going west and grain going east, is a rate situation that in general has always obtained as a system of breaking rates?

"A. Yes sir, so long as I have been in this line of business."

The action of the Commission, in the orders in question, is, thus, the overturning of the basis of the rate system of the entire western country. Its revolutionary character is manifest.

Moreover, if this so-called principle of the Interstate Commerce Commission is to obtain, it must be applied to transportation eastward. The railroads operating between St. Louis and Chicago and the Atlantic Seaboard, would be compelled to transport grain from those cities to the seaboard at one rate if the grain came from Illinois or Missouri; at another rate, if it came from Iowa, and at another if it came from Nebraska, and the rate would naturally vary in accordance with

the locality of each particular city at which the particular shipment originated. Thus we would have injected into the entire rate structure of the United States, uncertainty, indefiniteness and inequality, and the condition would be pure chaos. Practically every rate in the United States as it now exists, would be condemned by the principle of the Interstate Commerce Commission and a reorganization of the rate structure would be compelled.

. * .

The action of the Commission is purely arbitrary in that its design and purpose is to so change the relation of rates as to destroy the equal opportunities of competition now enjoyed by the communities affected. Its effect will be to change the commercial map of the United States, and centralize the business of distribution of merchandise and supplies in the eastern cities and the cities of the extreme west. It is entirely manifest that if the rates in and out of St. Louis are higher than the rates through St. Louis on merchandise from the Atlantic Seaboard to the Missouri River Cities, the merchants at St. Louis will be at a decided disadvantage over their competitors in the eastern and western cities. It is natural that business houses will seek the location at which they will have the greatest advantage. The business of distribution of merchandise and supplies will therefore center at the points where the advantage lies, namely at the extreme east and west.

We have a perfect illustration of the working of this principle, to the destruction of the distribution business of intermediate points, in the history of the establishment of the present rate structure between the Seaboard and the Mississippi River. At the beginning, between the Seaboard and the Mississippi River, there was no one continuous system; the lines consisted of various, separate railroads which joined at Buffalo, Cincinnati and other points. These separate systems

made their individual rates for transportation over their individual lines applicable to all merchandise, and established a system similar to that which now obtains in the west. Therefore. Cincinnati and other cities enjoyed an equality of opportunity in the distribution of merchandise throughout the west with their competitors at New York, Philadelphia and other eastern cities, and with Chicago and St. Louis on the west. As rates in and out of Cincinnati and these other cities were the same as rates charged on shipments through these cities, the merchants therefore could place their merchandise in the west at the same freight charge exacted in the case of shipments from their competitors whether located at New York, Chicago or St. Louis. In the course of time, however, these separate lines of railroad were consolidated and separate single systems of railroad operated between the Seaboard and the Mississippi River. When the separate lines were merged into the single system, the general rule of tapering rates per ton per mile over a single line of railroad was applied; therefore, the merchants at Cincinnati and other intermediate points no longer enjoyed the equality of opportunity in competition with their competitors in the east and west. As a result, while formerly there were large business houses at Cincinnati and other intermediate cities doing a large and profitable business in the distribution of merchandise throughout the western country, today that business has practically disappeared.

Mr. E. P. Ripley, President of the Atchison, Topeka & Santa Fe R. R. Co., in his affidavit filed in the Denver Rate Case (Transcript case No. 641, p. 53), states this fact in the following words:

"Affiant further says that by reason of the fact that under the system of rates whereby the charge for the long haul through all intermediate points is less than the sum of the charges for the shorter hauls to and from any intermediate points, the merchants at all intermediate points are, as aforesaid, denied equality of opportunity in competition with the merchants at either end of the line of railroad in the distribution of merchandise; and affiant says that the necessary result of such system of rate making is to centralize the business of the distribution of merchandise at the ends of the line of railroad.

"Affiant further says that this is well illustrated by the fact that such system of rate-making obtains on the lines of railroads between the city of New York and the cities of Chicago and St. Louis; and as a result of the application of said system of rate-making in said territory, jobbing houses at the intermediate cities between Chicago and St. Louis on the west and New York on the east, which in any substantial way competed with merchants at New York, Chicago and St. Louis in the distribution of merchandise throughout the west, have been largely forced out of business."

Mr. McVann, the expert witness for the intervening Missouri River jobbers in Case Number 663, on cross-examination, corroborates this statement. His testimony (Transcript case 663, pp. 529, 530) is as follows:

- "Q. You are in a general way familiar with the business of this western country?
- "A. Tolerably so as it relates to freight matters.
- "Q. And shipments and the character of shipments?
- "A. Yes, I think so.
- "Q. Is there in this intermediate territory about which you have testified between Chicago and St. Louis and the Atlantic Seaboard, a wholesale house in dry goods doing business west of the Missouri River, that you know of?
- "A. I knew of one that did business here formerly in very large amounts.
- "Q. Does it do it now?
- "A. No, I think not."

This change was made before the creation of the machinery for the regulation of railroads. But the disastrous effect upon the western distributing business of these cities, was of comparatively small importance. The development of the coal fields, iron fields, oil wells and gas wells and other sources of natural supply in the states of Pennsylvania, Ohio and Indiana completely revolutionized the character of the business of the cities of those states, and made manufacturing the great and predominant interest; the loss, therefore, of the western distributing business was the loss of the minor factor of the business in those cities.

With the western cities, however, it is otherwise; there, the distribution of merchandise and supplies is the principal factor of their commerce; and a destruction of this business would be disastrous to those cities. Mr. Marvin Hughitt, President of the Chicago & Northwestern Railway Company, speaking in his affidavit (Transcript case 641, p. 46), says:

"Affiant further says that, up to the present time, the distribution of merchandise and supplies has been a large and probably a predominant factor in the business and commerce of the cities located upon the Missouri River, and that these conditions seem likely to continue for at least a considerable period in the future; that if the said rate system which has long obtained is overthrown and the change aforementioned is forced upon the railroads, the result will be necessarily disastrous to the commercial interests of all said cities in the distribution of merchandise and supplies, since, as above set forth, those engaged in said business at said cities will be put at a disadvantage with respect to their competitors in the east and in the west. And thus the change will seriously injure the most important commercial interest of the said cities."

Another illustration of the commercial effect of the establishment and maintenance of a system of rates which do not recognize any basing points, and which taper in charge per ton per mile in accordance with distance, is furnished by the experience of such a system in Australia and its effect upon the development of cities there. The facts are easily ascertainable from standard works on transportation subjects. The

affidavit of Mr. James J. Hill (Transcript case 641, p. 61) is as follows:

"Affiant further says upon information and belief derived from standard publications on transportation subjects, that the effect of a system of rate-making which makes the continuous long haul cheaper than the two intermediate short hauls, in centralizing the business at the end of the line of railroad, is well illustrated by the experience of Australia. In Australia, the railroads extending into the interior from the port of Sidney in New South Wales, from Melbourne in Victoria, and from Adelaide in South Australia, have always applied and maintained a system of rates which did not break at any intermediate point; whereby the rate for the long haul was less than the sum of the rates for the two shorter hauls to and from an intermediate point; as a result of this system, the advantage which the shippers in the city at the end of the railroad had over the shippers at any intermediate point has forced, in large degree, all business involving transportation to the ports; and in 1901, there were living in Sidney 36 per cent of the population of New South Wales; in Melbourne 41 per cent of the population of Victoria, and in Adelaide 45 per cent of the population of South Australia."

The effect of the change from the present system of ratemaking to the new system proposed by the Commission in working disaster to the distributing interests of the western cities is clearly explained in the testimony of the witnesses in the case. Mr. J. W. Johnson, Vice President of the Missouri Pacific Railway Company in charge of the traffic (Transcript case 663, pp. 161, 162); George H. Crosby, Freight Traffic Manager Chicago, Burlington & Quincy Railroad Company (Transcript case 663, p. 193); Frank P. Eyman, General Freight Agent of the Chicago & Northwestern Railway Company (Transcript case 663, pp. 208, 209); Edward B. Boyd, Assistant to Vice President Missouri Pacific Railway Company (Transcript case 663, pp. 427 428); Marvin Hughitt,

President Chicago & Northwestern Railway Company (Transcript case 641, p. 45); E. P. Ripley, President Atchison, Topeka & Santa Fe Railway Company (Transcript case 641, p. 52); James J. Hill, former President Great Northern Railway Company (Transcript case 641, p. 59), all state specifically how the new system of rates, as contemplated by the orders of the Commission, would injuriously and seriously affect the western distributing centers. In the affidavits of Messrs. Hill, Hughitt and Ripley, the fact is stated in the following words:

"Affiant further says that the system of rates now obtaining, whereby, as aforesaid, rates 'break' at the Mississippi River and at the Missouri River, has obtained practically since the railroads were constructed between said rivers; that the relation of rates involved in the said system whereby the rates for shipments from the Atlantic Seaboard to the Missouri River were made up of the rate from the Atlantic Seaboard to the Mississippi River and the rate from the Mississippi River to the Missouri River, and whereby the rate from the cities of Chicago and St. Louis to the city of Denver was the same as the rate from the cities of Chicago and St. Louis to cities upon the Missouri River, and the rate from the said Missouri River cities to the city of Denver, has obtained continuously for practically a quarter of a century. affiant further says that the said system of rates and the said relation of rates which has so long obtained would be completely overthrown if the principle should be established that the rate for the through haul should be less than the sum of the rates for the two shorter hauls; and affiant says that the equality of opportunity in competition heretofore enjoyed as aforesaid by merchants in said cities will be greatly impaired as above set forth, and their competitors given an advantage over them as above set forth, if the said change should be made. And affiant says that the commercial conditions of the entire central west which, as aforesaid, are based upon and necessarily intimately related to the rate system always heretofore existing, will be revolutionized if the said change is made, and the effect of such change would be destructive and far-reaching in its evil results."

As the application of the Commission's rule to shipments of merchandise from the east would handicap and retard the western centers in the distribution of merchandise, so the application of the rule to shipments of grain eastward would seriously injure, if not destroy the western distributing centers, as markets for the products of the west. This is clearly stated in the affidavits of Messrs. Hill, Hughitt and Ripley (Transcript case 641, pp. 61, 62) as follows:

"Affiant further says that the system of rate-making whereby the rates on grain from the west break as above mentioned has been, and is, of great assistance to all shippers of grain, in that by virtue of this system intermediate markets for said grain have been established at the Missouri River, the Mississippi River, and Chicago; that at said points mills have been constructed and the various products of the grain manufactured; that the existence of these markets is of great value to the shippers of grain, in that it enables them to ship their grain by short hauls to the market, thereby preventing the damage to grain which would often happen from long, continuous shipments where the grain is not in good condition, which is frequently the case, especially in germinating periods; the existence of said markets is of great value to the shippers of grain because they provide a constant demand for the grain produced, and afford an opportunity for a sale at any time and in any quantity; the existence of the said markets is of great value to the shippers of grain, because they enable the surplus grain to be purchased from the producer and stored at the places wherein there will be the least freight charges involved, and also at the places from which the grain can be shipped to the points of ultimate consumption, avoiding all unnecessary railroad service, and, therefore, all unnecessary freight charge.

"Affiant further says that if the principle of rate-making, whereby rates break as above set forth, is abolished, and the principle established that the rate on grain for the through haul to New York from the point of production must be less than the sum of the charges from the point of production to any of the markets aforesaid, and the rate from such market to New York, the existence of the said

markets will be threatened and their development and usefulness will be very seriously impaired, and the said milling and other manufacturing interests practically de-

stroyed.

"Affiant further says that grain is handled in large quantities and at a very small margin of profit, and that any slight advantage in freight charges given to one point over another will radically change the movement of the grain."

* * *

3. The favoritism which inheres in the new system of the Commission, shows the arbitrary character of the action of that body. When we compare the system of rate-making which has so long obtained throughout the west with the situation which will obtain if the Interstate Commerce Commission is allowed to have its way, we have a striking contrast.

Under this rate adjustment, the various commercial centers of the west have and enjoy equality of opportunity in competition with their rivals in the east and west so far as their rates are concerned; in marked contrast to this equality is the favoritism and special advantages which the plan of the Interstate Commerce Commission would give to certain localities. If the purpose of the Interstate Commerce Commission should be carried out, a merchant in New York could deliver merchandise at the Missouri River Cities at a less freight charge than a Chicago or St. Louis merchant would be compelled to pay to receive such merchandise from the seaboard, and transport the same to the Missouri River Cities; so, too, merchants at the Missouri River Cities could ship from the Atlantic Seaboard to their warehouse, merchandise at a lower freight rate than their competitors in St. Louis or Chicago would be compelled to pay to receive from the Atlantic Seaboard, a like amount of merchandise and transport the same to the Missouri River. So if the plan of the Commission is extended to Denver, a merchant at Chicago or St. Louis could ship from his warehouse to the city of Denver, merchandise at a lower freight rate than that charged merchants at the Missouri River Cities for transporting a like amount of similar merchandise from Chicago or St. Louis to the Missouri River Cities, and re-shipping the same west to the city of Denver. And, under the same theory, a merchant of New York could ship merchandise from his warehouse to the city of Denver at a lower freight charge than would be imposed upon merchants at Chicago, St. Louis or the Missouri River Cities in transporting a like amount of similar merchandise from the city of New York to their respective warehouses and re-shipping the same to the city of Denver. Thus, in all these cases, the merchant at the extreme east or the extreme west would be favored in the matter of freight rates over the merchant at the intermediate cities.

As an illustration of the favoritism to localities which inheres in the plan of the Interstate Commerce Commission, we need but call attention to the decisions of the Commission in the Burnham-Hanna-Munger Case, in what is known as the Kindel Case, relating to rates to the city of Denver, and the Indianapolis Rate Case; quotations from the opinions in these cases, have been hereinabove set forth. Under the plan of the Commission, as shown in these opinions, the Missouri Pacific Railroad Company operating its line between the cities of St. Louis and Omaha, in transporting upon the same train between those cities, various cases of like merchandise, similar in every respect, would be compelled to ascertain the location of the merchant and the warehouse from which the respective shipments came; if one shipment came from a merchant at the city of St. Louis, the charge should be 60c per 100 lbs. first class; if one shipment came from a merchant at Indianapolis, the charge would be 55c per 100 lbs. first class; if one shipment came from a merchant in the city of New York, the charge would be 51c per 100 lbs. first class; and if others came from various cities intermediate between Indianapolis and New

York, the rates charged would vary according to the locality at which the eastern carrier received the freight.

* * *

4. The action of the Commission is purely arbitrary, because it has no relation to the cost, to the western carriers, of the service for which their charge is made. As we have already pointed out, the testimony in Case No. 663 (Transcript pp. 122, 135, 265, 287) establishes, without any contradiction whatever, the fact that the expense to the western railroads of handling through shipments of merchandise to be transported from the Mississippi River to the Missouri River, is, in all cases, as great, and in many cases greater than the expense to such roads of handling merchandise delivered to them at the Mississippi River for transportation to the Missouri River Cities.

In Case No. 641, where the Commission ordered lower through rates from Chicago and St. Louis to Denver than the combination of the local rates from Chicago and St. Louis to the Missouri River and from said River to Denver, it makes mention in its opinion of the difference in cost. But, in the bill filed in the case, Number 641, the averment with respect to comparative expense is as follows (Transcript case 641, pp. 16 and 17):

"Your orators further aver that in the transfer of merchandise from the city of Chicago and the city of St. Louis to the city of Denver, such merchandise can be carried through on the same line only on four roads as above stated; but that upon all other railroads serving the cities of Chicago, St. Louis, and Denver, there is involved a transfer from one railroad to another of all the merchandise shipped from the city of Chicago or the city of St. Louis to the city of Denver; that in part the said transfer is made in cars which go through from Chicago or St. Louis to the city of Denver; that in part the transfer

is made at the Missouri River cities from the cars of the eastern railroads to the cars of the western railroads; that whatever difference of expense there may be in the transportation of merchandise from St. Louis or Chicago through to Denver and the transportation of a like amount of similar merchandise from the city of Chicago or St. Louis to the Missouri River cities and the re-shipment thereof to the city of Denver, it is very small and very much less than the difference which will be made between the rates for the said service, respectively, if the said order of the said commission is given effect. other words, your orators aver that although the said opinion of the said commission purports to assign as its reason why the through rates should be lower than the combination on basing points the fact that no transfer is required in case of through shipments, while a transfer is presumably required on shipments moving on a combination of rates to and from basing points such reason does not apply to the several roads which terminate at the Missouri River cities, as aforesaid, and, moreover, the transfer charge is very much less than the amount of the reduction attempted to be made by said order, and said order is unreasonable and unwarranted even on the assumption stated in the said opinion in that regard."

This averment of the bill is, as we have said, admitted to be true since the only filing of the Commission is a demurrer. Thus that case comes to this Court with the record establishing the fact that the difference between the prescribed through rate from Chicago and St. Louis to Denver, and the sum of the local rates based on the Missouri River is greater than any difference in the expense to the carriers in handling shipments affected by the order. The order, therefore, has no relation to the expense of the carriers.

The fact that this arbitrary rule has no relation to the comparative expense to the western railroads of handling and transporting merchandise, is put beyond question by the decision in the Indianapolis Case. Merchandise is carried from Indianapolis into the city of St. Louis by eastern roads exactly

as merchandise from the Atlantic Seaboard is carried into St. Louis by the eastern roads. The exchange and delivery of the merchandise carried into St. Louis from the east is necessarily the same, whether the eastern railroad received the merchandise at Indianapolis or at the Atlantic Seaboard. The cost and expense of the western railroad in respect to merchandise delivered to it at St. Louis by eastern carriers, is necessarily the same in the case of two similar shipments, one of which is carried into St. Louis from Indianapolis, and the other from the Atlantic Seaboard. Yet, as we have shown, the Interstate Commerce Commission has decided that the western railroad, for transporting from St. Louis to Omaha, merchandise originating at Indianapolis, must charge, for that service, a higher sum than it may charge for the transportation of a similar shipment of like merchandise originating at New York. Thus the western railroad, receiving in the same way, at the same time, under the same circumstances, two identical shipments for transportation over its line from St. Louis to Omaha, must make a difference in the rate charged for that service, exacting 55 cents for first class upon the Indianapolis shipment, and 51 cents for first class upon the Atlantic Seaboard shipment although the expense to the carrier in both cases, is exactly the same.

* * *

5. The action of the Commission is the exercise of purely arbitrary power, because that body did not apply logically or fairly, the principle upon which it assumed the right to act. The Commission said that it is unreasonable to exact the full local rates as portions of the through rates; that where the service of transporting between the rivers was a part of a continuous transportation which began east of the Mississippi River, the charge for the transportation between the rivers, on such shipments, should be less than on shipments originating at

the river. If this rule or principle were fairly applied, the rate or charge of the eastern railroad for transpoting between New York and St. Louis, merchandise destined to the Missouri River Cities, which transportation is therefore a part of a continuous transportation beyond St. Louis should be less than the local rates charged for transportation between New York and St. Louis. In other words, if a difference in charge for transportation is to be imposed because the transportation is part of a longer continuous haul, then that is as true with respect to transportation from New York to St. Louis, as it is of transportation from St. Louis to Omaha. Yet the Interstate Commerce Commission dismissed the eastern railroads from the case, declined to make an order compelling the eastern railroads to make a difference in their rates between local and through shipments, but compelled the western railroads to make the difference in their charges between local and through shipments. If the rule was correct, it should be applied to both parties to the through transportation. To apply it to one only. is the exercise of a purely arbitrary power.

* *

6. The action of the Commission is purely arbitrary, because it ignores the fact that each railroad company is an individual entity owning its separate property.

It is true, as we have said, as a general rule, (there are important exceptions thereto as we have seen), that on a particular railroad the rates taper per ton per mile with reference to the length of the haul. The rational basis for this general rule is that in the service for transportation, there are three elements of expense: (1) the initial terminal expense; (2) the transportation expense; and, (3) the destination terminal expense. There thus inheres in each service of transportation, two terminal expenses; and these two terminal expenses are

the same, whether the shipment is hauled 50 or 500 miles. In making a rate for transportation for 50 miles, the two terminal expenses, with the transportation expense, are necessarily included; but in making a rate of 500 miles, the terminal expenses are distributed along a greater distance, and, therefore, the rate per ton per mile would be less for that haul. This is the rational basis for the general rule that the rate per ton per mile tapers according to the length of the haul. But this basis necessarily cannot apply to transportation handled by two roads separately. In such case, each carrier has two terminal expenses. Each railroad is entitled to its separate tariff rates based upon a sound and legal principle applicable to its transportation; and it is clear, therefore, that an assumption of power to establish a system of rates over two railroads upon a principle, the basis of which applies only to transportation by a single line, is an assumption of the power to practically ignore the separate rights of the separate carriers.

* * *

It is quite evident, from what has been said, that the purpose and effect of the orders in question are to create trade zones and to apportion the trade of those zones to particular jobbing centers.

The order in the Burnham-Hanna-Munger Case, allows merchants at the Missouri River cities and merchants at the Atlantic Seaboard to place their eastern shipments at the river at a less freight charge than is imposed upon St. Louis jobbers when they place such merchandise at the river. Thus, in all the contiguous territory or zone controlled by these rates, the eastern and western merchants are at an advantage; and an advantage in trade tends to its absorption.

The order in the Denver Case, allows merchants at Denver and merchants in the east a lower freight charge than is

imposed on the Missouri River jobbers in placing eastern goods at Denver. Thus in all the contiguous territory or zone, controlled by these rates, the eastern and western merchants are at an advantage; and an advantage in trade tends to its absorption.

Therefore, the power exercised in the making of these orders, is, as the Circuit Court well said, "the general power of life and death over every trade and manufacturing center in the United States."

. . .

When we consider how the orders in question will, if enforced, revolutionize the rate system which has obtained throughout the west ever since rails were laid into that territory, and how arbitrarily it overturns all the commercial conditions which have grown up in reliance upon this rate system, we see that the orders are, in reality, legislation of wide scope. To use the words of this Court in Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S. 197 (234):

"Such orders are instances of general legislation, requiring the exercise of the law-making power, * * * and instead of being regulations calculated to promote commerce and enforce the express provisions of the Act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation, in the promotion of what is supposed to be public policy."

The Circuit Court, therefore, rightly held the orders in question to be void as beyond the power of the Commission. The basis of the decision is clearly stated by the Court in the following words:

"It must be understood, however, that these orders of the Commission are enjoined, solely because, in our judgment, they lay upon the commerce and manufacturing of the localities affected, an artificial hand that Congress never intended should be put forth, and therefore, are outside the power conferred on the Commission by Congress."

. . .

The reduction in the revenue of the carriers, which would be compelled if the orders in question are enforced, would greatly exceed \$140,000 per year. (Transcript case 663, p. 440.) As the orders are beyond the power of the Commission, the interference with the rates and revenues of the carriers, which the orders contemplate, is without authority of law. The right of the carriers to an injunctive decree, to prevent the threatened wrongful invasion of their revenues, is too manifest to warrant extended discussion.

Respectfully submitted,

WILLIAM D. McHugh, SAMUEL A. LYNDE,

Counsel for Appellees in Case 641.

WILLIAM D. McHugh, Colin C. H. Fyffe,

counsel for Appellees in Cases 663 and 664.



Supreme Court of the United Sate

ANGE H. MCKENNE ates.

OCTOBER TERM, 1909.

No. 663.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

VR.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY ET AL.

No. 664.

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY ET AL., APPELLANTS,

VE.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY ET AL

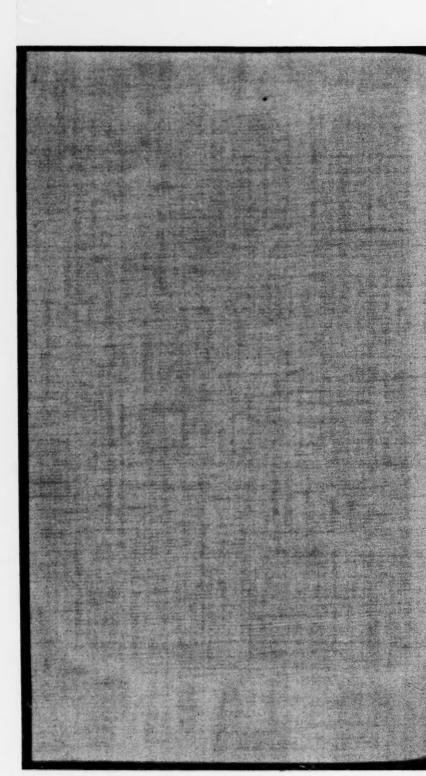
Appeals from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY ET AL, (Jobbing merchants of Omaha, St. Joseph and Kansas City.)

JOHN LEE WEBSTER,
Solicitor for
Burnham, Hanna, Munger
Dry Goods Co., et al.,
Appellants.

JOHN H. ATWOOD,



Supreme Court of the United States.

No. 663.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT, VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY ET AL.

No. 664.

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY ET AL., APPELLANTS,

VS.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

Appeals from the Circuit Court of the United States for Northern District of Illinois.

BRIEF FOR

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY ET AL, (Jobbing merchants of Omaha, St. Joseph and Kansas City.)

Statement of the Case.

At the time when these proceedings were had before the Interstate Commerce Commission the following tables of rates on the first five classes prevailed on through business from the Atlantic Seaboard Territory to the Mississippi river and from the Mississippi river to the Missouri river, and the combination or sum of the two rates made up the through rates from the Atlantic seaboard territory to the Missouri river cities, Omaha, St. Joseph and Kansas City.

The said rates on said 5 classes from the Atlantic seaboard territory to Mississippi river were, cents per 100 pounds, as follows:

| Classes | 1 | 2 | 3 | 4 | 5 |
|----------------|----|----|----|----|----|
| | - | - | - | _ | - |
| Cents per cwt. | 87 | 75 | 58 | 41 | 35 |

The rates on the said through business from the Mississippi river to the Missouri river cities, Omaha, St. Joseph and Kansas City, per 100 pounds, were as follows:

| Classes | 1 | 2 | 3 | 4 | 5 |
|----------------|----|----|----|----|----|
| | | _ | _ | _ | - |
| Cents per cwt. | 60 | 45 | 35 | 27 | 22 |

The through rates from the Atlantic seaboard territory to the Missouri river cities, Omaha, St. Joseph and Kansas City, were made up by the addition or sums of the two rates *supra*, making the through rates on said 5 classes as follows:

| Classes | 1 | 2 | 3 | 4 | 5 |
|----------------|-----|-----|----|----|----|
| | | | _ | | - |
| Cents per cwt. | 147 | 120 | 93 | 68 | 57 |

The gross amounts of the through rates from the Atlantic seaboard territory to the Mississippi river were divided so that the roads eastward from Chicago received as their portion of the through rates the following:

| Classes | 1 | 2 | 3 | 4 | 5 |
|---------------|------|------|------|------|------|
| Cents ner cwt | 79 9 | CO 4 | 40 A | 94 9 | 90.4 |

The railroads west from Chicago received as their portion of the said through rates the following:

Classes $\frac{1}{74.7}$ $\frac{2}{57.6}$ $\frac{3}{44.6}$ $\frac{4}{33.7}$ $\frac{5}{27.6}$

The rates on the first 5 classes on through business from the Atlantic seaboard by way of Chicago to the Mississippi river, as stated *supra*, is arrived at by adding to the proportional retained by the lines east of Chicago, the following proportionals from Chicago to the Mississippi river crossings, from East Dubuque on the North to East St. Louis on the South, to-wit:

Classes $\frac{1}{14.7}$ $\frac{2}{12.6}$ $\frac{3}{9.6}$ $\frac{4}{6.7}$ $\frac{5}{5.6}$

(For verification of the correctness of the above tables of rates see the report of the Commission, rec. pp. 26-27.)

The petition filed with the Interstate Commerce Commission averred regarding said rates, as follows: (rec. pp. 17-18. Folio 29.)

"That the standard all-rail through rates from New York to Kansas City, St. Joseph and Omaha are as follows: \$1.47, \$1.20, 93c, 68c and 57c per hundred pounds for the said five classes of freight matter respectively; that said through rates from New York to said Kansas City, St. Joseph and Omaha are arrived at by adding to the rates from Mississippi River points, as shown above, the following rates subject to official classification, to-wit: 87c, 75c, 58c, 41c and 35c per hundred pounds for said five classes respectively; that the aforesaid through rates, applying from New York to Kansas City, are observed by defendant carriers on traffic moving by way of Chicago; that in the division of said through rates from Atlantic seaboard to said three Missouri River cities, Kansas City, St. Joseph and Omaha, each of said defendant railroad companies allows and pays to said eastern connections 72.3c, 62.4c, 48.4c, 34.3c and 29.4c per hundred pounds on the said five classes respectively; and charges, accepts and retains as their respective shares of said through rates upon the several classes aforesaid 74.7c, 57.6c, 44.6c, 33.7c and 27.6c per hundred pounds."

Said petition further averred that said through rates were unjust, unreasonable, excessive and discriminatory against and prejudicial to said complainants. (rec. pp.

19-20.)

"That the through rates charged from the Atlantic seaboard to said three cities. Omaha, St. Joseph and Kansas City, to-wit: \$1.47, \$1.20, 93 cents, 68 cents and 57 cents per hundred pounds for the said five classes of freight matter respectively, are unjust, unreasonable, excessive and discriminatory against, and prejudicial to these complainants, and each of them, and that the said sums charged, accepted and retained by the defendant companies, respectively, on said through rates from the Atlantic seaboard via Mississippi River, to-wit: 60 cents, 45 cents, 35 cents, 27 cents and 22 cents per hundred pounds, and 74.7 cents, 57.6 cents, 44.6 cents, 33.7 cents and 27.6 cents per hundred pounds via Chicago for said five classes, respectively, are excessive, unjust, unreasonable in and of themselves because said sums and rates are higher and greater than are reasonably necessary to pay the cost of transportation and maintenance, and a fair profit on a fair valuation of the property of the defendant companies employed in transporting said freight between said points, and are unjustly discriminatory against and prejudicial to these complainants, and each of them."

The petition filed before the Interstate Commerce Commission prayed that the Railroad Companies be ordered to desist from charging the said through rates stated *supra*, and that the railroad lines west from Chicago be forbidden to accept and retain the portions of the through rates retained by them as set forthin the table *supra*, and that the said through rates be reduced by a reduction of the portions retained by the railroad lines west from Chicago and which part of the prayer reads as follows: (rec. pp. 20-21.)

"Now, therefore, these complainants pray that defendants be required to answer the charges herein and that an order be made commanding defendants, and each of them, to wholly desist from the aforesaid violations of the law and from charging, accepting and retaining said \$1.47, \$1.20, 93 cents 68 cents and 57 cents per hundred pounds for the said five classes of freight matter, respectively, on said through rates from the Atlantic seaboard to the said Cities of Kansas City, St. Joseph, and Omaha, and forbidding said defendants, and each of them, from charging, accepting and retaining as their proportions of said through rates on business moving via Chicago to Kansas City, St. Joseph and Omaha, 74.7 cents, 57.6 cents, 44.6 cents, 33.7 cents and 27.6 cents per hundred pounds and via Mississippi River 60 cents, 45 cents, 35 cents, 27 cents, and 22 cents per hundred pounds for said five classes of freight manner, respectively.

And complainants further pray that defendants be ordered to publish, within a reasonable time, through rates from the Atlantic seaboard to Kansas City, St. Joseph, and Omaha, and to adopt and put said rates in force, and that such rates shall not exceed \$1.10, 95.\frac{1}{2} cents, 72.\frac{1}{2} cents, 51.\frac{1}{2} cents, and 44 cents, per hundred pounds for the five classes aforesaid."

Answers were filed and voluminous testimony taken, which testimony appears in the record, pages 721 to 1040. The Interstate Commerce Commission, after the hearing, made the order complained of which commanded the railroad companies west of Chicago to desist from charging the proportional between the Mississippi and the Missouri rivers on through business, then in force as follows:

| 1 | 2 | 3 | 4 | 5 | |
|----|----|----|----|----|--|
| - | _ | - | - | | |
| 60 | 45 | 35 | 27 | 22 | |

and that they be ordered to put in force a rate on the said 5 classes applying to said through business which shall not exceed the following class rates in cents per 100 pounds:

| | 1 | . 2 | 3 | 4 | 5 |
|----|----|---------|----|----|----|
| | _ | _ | _ | | - |
| | 51 | 38 | 30 | 23 | 19 |
| 00 | nn | 99.90 \ | | | |

(see rec. pp. 38-39.)

It will thus be seen that the petition filed before the Interstate Commerce Commission dealt alone with and only prayed for a reduction of the through rates on Atlantic seaboard business destined to the Missouri river cities, and that the order of the Commission did not go beyond the scope of the petition and the prayer thereof and ordered a reduction on the said through rates by reducing the proportionals received and retained by the western railroads for the transportation between the Mississippi and the Missouri rivers.

In the proceedings before the United States Circuit Court at Chicago the railroad companies presented the case to the court on the theory that the order as made by the Commission reduced the through rates from the Atlantic seaboard territory to the Missouri river cities by a reduction of the proportional rates between the Mississippi and the Missouri rivers, but which said order did not give the intermediate or the Central Traffic Association territory the benefit of said reduction in rates between the two rivers, and that the tendency and effect of the said order was to create preferential zones or territories in business, and to break down established zones and basing points theretofore created and established by the railroad companies. The majority of the court in their opinion based the order of

injunction not upon the ground that the rates established by the Commission were too low or were in and of themselves unjust and unreasonable, but that the force and effect of the order was beyond the power of the Commission to make and beyond the authority conferred upon it by the Act to Regulate Commerce. (see rec. pp. 1054, 1062,)

Assignment of Errors.

(rec. p. 1081.)

I.

"That the Court erred in entering the said order and decree setting aside and annulling the order of the Interstate Commerce Commission of June 24, 1908, which in the order and decree of this court is more particularly set forth."

II.

"That said Court erred in enjoining and restraining the Interstate Commerce Commission from enforcing its said order of June 24, 1908, reducing the rates between the Mississippi River crossings, East St. Louis, to East Dubuque, Illinois, inclusive, and the Missouri River cities, Kansas City, and St Joseph, Missouri, and Omaha, Nebraska, on business originating at the Atlantic seaboard and destined to said Missouri River crossings, to the following scale of rates on the first five classes. to the following cents per hundred pounds: First class, from 60 to 51 cents; Second class, from 45 to 38 cents; Third class, from 35 to 30 cents: Fourth class, from 27 to 23 cents: Fifth class, from 22 to 19 cents; which said order of the Interstate Commerce Commission reducing said rates is in said decree more particularly set forth."

III.

"The Court erred in finding as set forth in the majority opinion of the Court, that the Interstate Commerce Commission was without power or authority under the Interstate Commerce Act to make the said order of June 24, 1908, complained of."

IV.

"The said order, judgment and decree of the Court is erroneous in that it should have found that the said order of the Interstate Commerce Commission of June 24, 1908, was properly and regularly made and that the Interstate Commerce Commission was legally and duly empowered under the Interstate Commerce Act to make the said order."

٧.

"The Court should have found that the said order of the Interstate Commerce Commission of June 24, 1908, did not produce any undue or unreasonable discrimination against any person, company, or locality, or give any undue or unreasonable preference or advantage to any person, company or locality."

VI.

"The Court should have found as a matter of law, that under the pleadings and facts proven, that the complainant railroad companies did not have such a direct interest in the questions involved as to give them a standing in a court of equity to insist that the said order of the Interstate Commerce Commission of June 24, 1908, produced any undue or unreasonable discrimination in favor of any person, company, or locality, or that said order gave any undue or unreasonable preference to any person, company or locality."

VII.

"The Court should have found that the rates established by the Interstate Commerce Commission in its order of June 24, 1908, between the Mississippi River crossings and the Missouri River Cities on business originating in the Atlantic seaboard territory, and consigned to the Missouri River cities, Kansas City, and St. Joseph, Missouri, and Omaha, Nebraska, were and are just and reasonable rates, and would yield to the complainant railroad companies fair and reasonable compensation for the service to be performed, and should have denied the injunction prayed for by the complainants."

Brief of the Argument.

I.

The Injunction Seems to Have Been Granted on a Misconception of the Powers of the Commission and a Misinterpretation of the Proceedings Under Which the Commission Made the Order.

Sec. 3 of Act to regulate Commerce contains the following:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, * * * or to subject any particular person, company, firm, corporation, or locality, * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Sec. 12 of the Act gives the Commission "authority to inquire into the management of the business of all com-

mon carriers," &c., but not power to make rates for railroads on its own motion.

Sec. 13 of the Act confers authority on the Commission to receive and investigate complaints when filed.

"That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified * * * If such carrier shall by the Commission. not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Sec. 15 empowers the Commission to make orders after the investigation of complaints.

"That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the

provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act."

It seems that the Interstate Commerce Commission is not invested with the general power to establish a universal system of railroad rates, but in this regard its powers are limited to an investigation of the specific rates complained of. The railroad company shall have an opportunity "to answer" the complaint "in writing." After answer "it shall be the duty of the Commission to investigate the matters complained of." "After full hearing upon a complaint made" the Commission, if it be so advised, is empowered "to make an order" that the carrier shall "cease and desist" from the rate complained of and shall order the railroad company not to collect or receive a rate greater than that "prescribed by the commission.

The through rates from the Atlantic seaboard to the Missouri River Cities, Omaha, St. Joseph and Kansas City, were the only rates complained of. The order made by the Commission was limited to the matter presented to it under the issues on said hearing and this was the extent of its power in the premises. The Commission, on a complaint against a specific rate between two specific points (Atlantic seaboard and the Missouri River cities) was not authorized to make an order establishing universal rates that should apply to all systems or merchandise from any and every initial point to any and every point of destination that might chance to pass over all or any part of the lines of the railroads complaining herein.

The under-lying principle upon which the court appears to have granted the injunction may be gathered from the following excerpts from the opinion of *Grosscup*,

Circuit Judge:

"Indeed, the contest, in its larger aspect, is a contest, not so much between the shippers and the railroads as between the commercial and manufacturing interests of the Missouri River cities and of the Atlantic seaboard on the one part (their interests being identical) and the commercial and manufacturing interests of what is known as the Central Traffic territory (the territory west of Buffalo, Pittsburg, and Parkersburg, and east of the Mississippi River) on the other part."

"The joint rate now in force from the Atlantic seaboard to the Missouri River, on first-class matter, is \$1.47 per 100 pounds. The proposed reduction by the Commission is to \$1.38 per 100 pounds. The through rate now in force on the same matter from the Atlantic seaboard to the Mississippi River is 87 cents per 100 pounds, which, plus the through rate from the Mississippi River to the Missouri River (60 cents per 100 pounds) makes the same total, \$1.47 per 100 pounds, as the joint rate from the Atlantic seaboard to the Missouri River. It is not proposed by the Commission that these through rates, or either of them, should

be reduced. On the contrary, the Commission proposes to retain them, to the end that the manufacturers and jobbers on the Atlantic seaboard may deliver their goods to the Missouri River cities on a joint rate 9 cents less per 100 pounds on first-class matter (and a corresponding differential upon second, third, and fourth class matter) than would be done if the goods, or (in the case of manufacturing) the raw material going into the goods, were first sent to the cities in the Mississippi River territory and then resent from those cities to the Missouri River cities."

"Whatever may be the principle on which these orders are based, the effect will be, by means of the differentials named, to protect to a certain degree the Missouri River jobbers and manufacturers within a given zone of territory against the jobbers and manufacturers in the Central Traffic Association territory."

"But in the case here, the question involved is not a question of fact, but a question of power—the question is not whether, by the application of correct principles, a given rate has been decided by the Commission to be unreasonable, but whether the principles applied are themselves within the power of the Commission; for Congress did not intend to confer upon the Commission power to do by indirection what it could not directly do—did not intend to include within the word 'reasonable' every power over the trade and manufacturing of the country that the Commission should determine it was reasonable that it (the Commission) should possess."

"It must be understood, however, that these orders of the Commission are enjoined solely because, in our judgment, they lay upon the Commerce and manufacturing of the localities affected, an artificial hand that Congress never intended should be put forth, and therefore are outside the power conferred on the Commission by Congress; for with the question of a reduction in rates, or a readjustment of rates, from which such artificial results have been eliminated, we are not now dealing."

The majority opinion of the Circuit Court seems to be based on the idea that the Commission exceeded its power because it limited the order which it made to the specific rates complained of and which were the subject matter under investigation. On the other hand, if the order had been universal, that is, made to apply to all rates and to all shipments passing over the lines of railroads between the Mississippi and Missouri Rivers, regardless of the initial point of shipment or point of consignment, that the order would have been within the powers of the Commission to make and that the injunction would not have been granted.

The force, effect and scope of such reasoning must lead to the conclusion that the rates charged by the rail-road companies between two specific points, say from Chicago or from St. Louis to Omaha, St. Joseph and Kansas City, must be the same on all merchandise of the same class regardless of the point of shipment or point of destination. The record in this case is full of evidence that the rates between said points are not and never have been the same on the same classes of merchandise; but to the contrary, that the said rates always have been and are different, dependent on the point of shipment and point of destination.

If the logic of the opinion of *Grosscup*, Circuit Judge, is sound the power of the Commission is limited to the tapering down of rates, but which tapering down must apply to all rates, and to all classes of merchandise, and from all initial points to all points of destination, so as to preserve the existing relation of rates between all localities.

If therefore, the railroad companies by any previously established system of rates have built up favorite localities by discriminating against other localities, the Commission is powerless to reduce the particular rates which are too high because forsooth it would disturb existing commercial conditions. To so hold is to strip the Commission of the power to correct existing evils in railroad rates, or to reduce rates which after investigation are found to be too high. This would be in conflict with the letter and the spirit of the Act, and make the Commission a useless body, stripped of all effective power.

Minneapolis & St. Louis R. R. Co. vs. Minnesota, 186 U. S. 257, is a case where the railroads contended that the state could not interfere with the structure of rates, or with the combination of rates as between two or more companies, and the court said, p. 261: "to state such a proposition is practically to answer it." The court further said, p. 262: "There is an underlying fallacy in the argument of the railroad company in this connection that the sum of the two reasonable local rates cannot be unreason-

able."

The Interstate Commerce Commission found as a fact that the previously existing through rates from the Atlantic Seaboard to the Missouri River cities were "unreasonably high" and should be accordingly reduced as per the order of the Commission.

"The through rates so established are, in our opinion, unreasonably high. This is so because those portions of the through rates which apply between the Mississippi River crossings and the Missouri River cities are too high. These are defendants' 'separately established rates' which are 'applied

to the through transportation' and, therefore, the through rates should be adjusted by reduction of those factors or parts thereof which are found to be unreasonable." (rec. p. 34.)

As the case now stands, the finding of the commission that the through rates are "unreasonably high" and that the newly established portion of the rates between the rivers yields a reasonable compensation to the railroad companies for the services performed is not challenged by any evidence in the record.

Baker, Circuit Judge, in his opinion said, rec. p. 1063:

"There is no proof whatever that the rates which the Commission prescribed as just and reasonable are not sufficient to pay the cost of handling that traffic, to cover that traffic's full proportion of maintenance and overhead expenses, and to return to the carriers an ample net profit. Furthermore, proof is lacking that, if the carriers should reduce other rates to correct what they claim is the maladjustment caused by the Commission's order, the reduction would not leave them abundant net returns. For the purpose of this hearing, therefore, it must stand as an agreed fact that the present reduction is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation."

So far as this case now stands on the record it is confessed that the rates ordered by the Interstate Commerce Commission in and of themselves are reasonable and compensatory rates. The question is, shall the enforcement of these reasonable and compensatory rates so fixed by the Commission be enjoined simply because some persons, firms, or localities do not get the benefit of them. If such persons, firms and localities do not get the benefit of them, it is because the railroad companies decline to give such persons, firms and localities the benefit of said rates.

The railroad companies are not prevented from doing so by any order of the Commission.

If the rates ordered by the Commission are to be confessed as reasonable and compensatory rates for the services between the rivers, it follows as of course that whenever the railroad companies charge a higher rate to other persons, firms or localities, that as to them the railroads are charging a rate which is unreasonably high. Is the injunction of the court to be invoked against a rate which is reasonable and compensatory in and of itself, when the effect of such injunction is to protect the railroad companies in charging a higher rate for that service, to-wit: a rate which is "unreasonably high?" Is justice to be denied to certain shippers between the rivers when the effect of the denial is to permit a greater wrong, to-wit: excessive charges to all shippers? If the rates had been so reduced between the rivers on any and all shipments, no matter from whence they came, or to where they were consigned, the railroad companies according to their own contention would have no case. In other words, if the reduction had been universal it would have been all right, and is all wrong simply because it reduces the rates on a part of the merchandise carried.

Confessedly if the order of the Commission had reduced the rates on all traffic between the rivers it would have reduced the earnings of the railroad companies to a much larger extent. Wherefore, the railroad companies are not in a position to say that they are injured or damaged because the order is limited to seaboard business and not extended to all business.

The railroads in this case are driven to the point of insisting that the injunction shall stand on the pretext that the effect of the order will result in a discrimination

against persons, companies, or localities, and not per se injurious to themselves.

The railroads themselves are not injured or damaged by the order of the Commission. The rates which were reduced the Commission found to be too high; therefore the railroads are not entitled to receive the said rates. If the reduction in rates had applied to Central Traffic Association territory the reduction in revenue to the railroad companies would have been greater than it is under the order made. The railroads tried the case upon the theory that the order discriminates between persons and localities. On this issue the railroad companies have no interest.

A party cannot be heard to complain of a matter "because it operates oppressively upon others. The hurt must be to himself." Smiley vs. Kansas, 196 U. S. 447. The court will not listen to a party whose rights are not affected by the matter complained of and "who has no interest in defeating it." Clark vs. Kansas, 176 U. S. 114-18.

In Supervisors vs. Stanley, 105 U.S. 305, this court said p. 311:

"What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?"

In Allott vs. American Straw Board Co., 237 Ill., 55 the court said pp. 62-3:

"It has been repeatedly held that equity will not assume jurisdiction and issue an injunction unless the party complaining shows that he will be injured if relief is not granted. (Shonk Tin Print-

ing Co., vs. Shonk, 138 Ill., 34.) And it is also a rule that the allegations must be clear and distinct and supported by satisfactory evidence that substantial injury will be sustained. (Springer vs. Walters, 139 Ill., 419.) It has also been held that to authorize an injunction there should not only be a clear and palpable violation of the rights of the complainant, but the rights themselves should be certain and such as can be clearly ascertained and measured."

The intervening co-complainants (rec. p. 116) have no right to be heard to complain of the order of the Interstate Commerce Commission or to the benefit of an injunction for the reason that their remedy in the first instance, if the rates ordered were injurious or discriminatory against them, was to apply to the Commission by petition in the regular way for an investigation of the The basis of their complaint is that the rates facts. ordered by the Commission disturb commercial conditions and grant a preference and advantage to persons shipping merchandise from the Atlantic Seaboard to the Missouri River cities. The Commission ruled upon the pleadings and testimony before it that the through rates from the Atlantic Seaboard to the Missouri River cities were too high. On this record it now appears that other merchants from Milwaukee, Chicago, St Louis, Detroit and Cleveland (who have not applied to the Commission for relief) pray the court to enjoin the order of the Commission on the ground that the previously existing rates were fair, just and reasonable. As a matter of law that question, being one of fact, should first have been submitted to the Commission.

In Texas & Pac. Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426-439, this court said:

"That the act to regulate commerce was intended to afford an effective means for redressing the In Louisville &c. Ry. Co. v. Behlmer, 175 U. S. 648-75 this court said, p. 675:

be successfully inflicted."

"But the law attributes *prima facie* effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising."

In Tift vs. Southern Ry. Co., 138 Fed. 753-60, the court said, p. 760:

"In view of these considerations and precedents, it can, we think, be no longer open to question that the interstate commerce commission is the expert tribunal empowered by law to determine, in the first instance, the reasonable or unreasonable character of the rates charged for transportation in interstate commerce."

In Clement vs. Louisville & N. R. Co., 153 Fed. 979, the court said, pp. 981-2:

"The plaintiff cannot maintain the present action in this court under the allegation of an unreasonable discrimination, until he has first applied to the Interstate Commerce Commission, and sought to obtain a correction of the tariff, if it is unjust and discriminating, from that body. T. & P. Ry. Co. vs. Abilene Cotton Oil Co. 204 U. S. 426."

"If the charge is made according to a regular tariff, and that tariff does establish an unfair and illegal discrimination in making the charge herein complained of, then the proper and fair way to correct the discrimination is to correct it at the same time as to every one affected by it. This can be done only by proceeding before the Interstate Commerce Commission. When complaint is made to the Commission, it may decide that the charge is proper and should be allowed. An opposite conclusion might be reached in this suit. The result, then, would be to establish for a while an unfair discrimination in favor of this plaintiff."

Confessedly the act to regulate commerce provides that merchants or localities having cause to complain of a rate shall file their complaint before the Commission, an issue shall be formed, evidence taken and a hearing had. Why should a court in the first instance, on the application of a shipper, enjoin a rate either because it is too high or because it is too low or because it is driscriminatory? Why an Interstate Commerce Commission to hear and decide such questions of fact if the courts are to still retain jurisdiction in equity to grant the injunction as prayed for by the intervening complainants in this case. If the rate ordered by the Commission had applied to the Central Traffic Association territory as well as to the Atlantic Seaboard the merchants of Milwaukee, Chicago, Cleveland, Detroit and St. Louis would not complain. don't they ask the Commission to extend the order to include them? That would be a simple way out of the difficulty and at the same time give the Missouri River cities the benefit of the reduced rates, relieving them from the burdens of a through rate which the Commission found to be too high.

Is it Possible the Commission Must Recognize in All Rates Basing Points Artificially Created by the Railroads?

It seems to be the contention of the railroad companies that because Chicago and St. Louis have become large cities that the said roads have the right to make the said cities basing points for rate making and that because nature has made two rivers, the Mississippi and the Missouri, that the roads have the right to use said rivers as basing points in rate making and that all through traffic passing through said basing points shall be the sum of the rates to and from each of the basing points to the next basing point. Notwithstanding these basing points are artificial creations of the railroad companies in rate making, the contention is, as indicated by the majority opinion of the Circuit Court, "that Congress never intended to confer upon the Interstate Commerce Commissionthe right to interfere with these basing points or with through rates which were made up of the sum of the locals between basing points. Is it possible that it can be seriously contended as a matter of law that the railroads can create artificial basing points and make the sum of the locals between basing points a through rate, and that neither Congress nor the Interstate Commerce Commission has the power to fix a reasonable through rate because, perchance, it may interfere with these artificially created basing points of the railroad companies?

The railroad companies adhere to no such construction of rates. The Pacific Coast terminal rates, the Washington and Spokane common points rates, the Oklahoma rates and the El Paso and Texas common points rates are each and all a departure therefrom and each and all are much less than the rates ordered by the Commission.

The Commission found the through rates from the Atlantic Seaboard to the Missouri River cities to be too high. Is the Commission powerless to reduce said rates because the railroads have fixed the amount of that through rate on the sum of the locals between two basing points? If this limitation on the power of the Commission exists then the railroad companies, by basing all through rates upon the sum of the locals between basing points, can render the Commission powerless to regulate or reduce any through rate.

In fact the order of Commission does not destroy or ingnore either Chicago or Mississippi River as basing points. It leaves the rates east of these points undisturbed and reduces a rate between two basing points to wit: the rivers.

The question at hand is not whether the Commission is clothed with power to build up artificial commercial zones of trade or trade centers. That is what the railroad companies insist for themselves that they have the right to do and have done. And because these centers may have been artifically created it is insisted that the Commission is powerless to fix a reasonable through rate to any other point even though demanded by business conditions. It is said that the effect of the order made by the Commission will be to protect the Missouri River jobbers and manufacturers against the jobbers and manufacturers of the central traffic association territory and that such was the purpose of the Commission in making the order. We shall undertake to demonstrate in another part of this brief that such was not the purpose and intent of the Commission and that such is not the effect of the order.

The Issue Litigated Before the Interstate Commerce
Commission was Whether the Through Rates
From the Atlantic Seaboard Territory to the
Missouri River Cities were Unreasonable, Unjust and Discriminatory in that They were Too
High. The Commission Found as a Fact that
Said Through Rates "Were Unreasonably High"
and ordered a Reduction of that Part of the
Through Rates Which Applied Between the
Mississippi and the Missouri Rivers.

What was said in the majority opinion of the Circuit Court to the point "that there was no inquiry by the Commission respecting the reasonableness or unreasonableness of the rates between the Mississippi River and the Missouri River," (rec. p. 1058) is a misconception of what was before the Commission and of what was determined by the Commission. Baker, Circuit Judge, speaking to the same point said of the two issues which were before the Commission: (rec. p. 1065.)

"The first was the reasonableness of the \$1.47 seaboard Missouri river rate in and of itself." * * *

"The other issue was what, if any, reduction could be made without doing injustice elsewhere?" * *

"In short it seems to me that the Commission took into consideration all the pertinent facts and circumstances effecting the questions presented by the complainants before them."

A large amount of evidence was taken before the Interstate Commerce Commission bearing upon this question. (rec. pp. 721-1040.) For the averments of the petition filed before the Interstate Commerce Commission bearing on this point see quotations in the Statement of the Case *supra* in this brief, pp. 3-4. The Commission speaking on this point said: (rec. p. 34.)

"The through rates so established are, in our opinion, unreasonably high. This is so because those portions of the through rates which apply between the Mississippi River crossings and the Missouri River cities are too high.

Evidence was introduced before the Commission tending to prove the through rates from the Atlantic seaboard territory to the Missouri river cities were unreasonable, unjust and too high, and discriminatory against Omaha, St. Joseph and Kansas City, and which evidence may be epitomized as follows:

First. The amount of dry goods business in said Missouri river cities was \$40,000,000 per year, (rec. pp. 24, 732, 896,) and that inbound freight charges paid were 20% of total cost of doing the business, or a sum equal to 3 or 3½% of total sales; (rec. pp. 732, 733, 754, 898) that under existing rates St. Paul and Minneapolis on a business of \$5,000,000 per year have an advantage in freight rates paid of \$40,000 per year over a like amount of business done by Omaha, St. Joseph and Kansas City merchants. (rec. pp. 24, 735, 897.)

Second. That under existing rates St. Louis pays 87c per hundred lbs., for 1100 miles haul from New York, while Missouri river cities pay .60c between the rivers, an average haul of 300 miles; whereby St. Louis has an advantage in territory, East and Southwest, of Omaha, St. Joseph and Kansas City. (rec. p. 736 and complainants' exhibit 5-a. rec. p. 1040). That St. Paul and Minneapolis have a through rate from the Atlantic seaboard of \$1.15, .99c, .76c, .53c, .46c, or a proportional rate from Chicago of .40c, .34c, .26c, .18c, .16c, giving the twin cities an advantage of .32c, .21c, .17c, .15c, .11c, over Omaha, St. Joseph and Kansas City; whereby the twin cities control the trade in the north-western territory to the Pacific

coast. (rep. of Com. rec. pp. 23, 25, 26. *Byrne*, rec. pp. 734-735. *Smith*, rec. p. 753. *Hundley*, rec. p. 896. Complainants, Exhibit No. 2 rec. p. 1040.)

Third. That under existing rates, Omaha, St. Joseph and Kansas City are practically in a "pocket." (Byrne,) rec. p. 736. McVann, rec. p. 763. Complainants' Exhibit No. 2 and Exhibit 5-a, rec. p. 1040.)

Fourth. The rates from New York to Missouri River crossings:

Of said rates the portions earned by the roads east of Chicago are: (average miles about 920.)

Classes Rates per cwt.
$$\frac{1}{72.3}$$
 $\frac{2}{62.4}$ $\frac{3}{48.4}$ $\frac{4}{34.3}$ $\frac{5}{29.4}$

Portions earned by the roads west from Chicago to Mississippi River crossings, (East Dubuque on north to East St. Louis on south. Average miles about 180.)

Classes
Rates per cwt
$$\frac{1}{14.7}$$
 $\frac{2}{12.6}$ $\frac{3}{9.6}$ $\frac{4}{6.7}$ $\frac{5}{5.6}$

Rate between Mississippi and Missouri Rivers on business from Atlantic Seaboard: (average miles about 300.

Classes
$$\frac{1}{60}$$
 $\frac{2}{45}$ $\frac{3}{35}$ $\frac{4}{27}$ $\frac{5}{22}$

(rec. pp. 26, 27, 32. *McVann*, rec. p. 775. Complaint Ex. 3, rec. pp. 1006-1008.)

Fifth. If same goods go from New York to St. Paul or Minneapolis the rates are as follows:

New York to Chicago,

| 1 | 2 | 3 | 4 | 5 |
|----|----|----|----|----|
| _ | _ | _ | - | - |
| 75 | 65 | 50 | 35 | 30 |

Chicago to Twin Cities,

$$\frac{1}{40} \quad \frac{2}{34} \quad \frac{3}{26} \quad \frac{4}{18} \quad \frac{5}{16}$$

Total New York to Twin Cities,

Total New York to Missouri River,

(rec. pp. 23, 26, 27, 29. *McVann*, rec. pp. 775, 777. Complaint Ex. 1, rec. p. 1004.)

Sixth. Physical conditions and mileage substantially the same from Chicago to Omaha, St. Joseph and Kansas City as from Chicago to Twin Cities. (rec. pp. 779, 1014.)

Yet the rate on Atlantic Seaboard business west of Chicago to Twin Cities is:

To Omaha, etc.,

(rec. pp. 27, 1012, 1013.)

If rate to Omaha, St. Joseph, and Kansas City was figured on basis of rate to St. Paul and Minneapolis the rate from Chicago to Missouri River cities would be about:

$$\frac{1}{45} \quad \frac{2}{38\frac{1}{2}} \quad \frac{3}{29\frac{1}{4}} \quad \frac{4}{20\frac{1}{4}} \quad \frac{5}{18}$$

(See McVann, rec. p. 777, Ex. rec. p. 1011.)

Seventh. On the basis of rates from New York to Chicago the rates from Chicago to Omaha, St. Joseph and Kansas City would be:

Classes 1 2 3 4 5
Rates per cwt. 38.5 33 25.2 17.6 14.7

And through rates from New York to Omaha, St. Joseph and Kansas City would be:

Classes 1 2 3 4 5
Rates per cwt. 113.5 98 75.2 52.6 44.7
(Complaint Ex. 3, rec. pp. 1006-1007.)

Eighth. The rates from New York to Omaha, St. Joseph and Kansas City if extended on same basis as from New York to St. Louis, would be:

Classes 1 2 3 5 Rates per cwt. 110 951 721 511 (McVann, rec. p. 774. Ex. No. 4, rec. p. 1009.) And the rates between the Rivers would be: 37 243 201 164 13 (Ex. 4, rec. p. 1009.)

Ninth. The rates from Chicago to Missouri River crossings on Eastern business consigned to the following named points are as follows:

Pacific Coast, 33\frac{2}{2} 29\frac{1}{2} 25\frac{1}{2} 23\frac{1}{2} 20\frac{1}{2}

Oklahoma, 48 41 3-10 34 2-10 29\frac{1}{2} 23

El Paso, 47 1-10 41 1-10 34 8-10 31 8-10 24 6-10

Montana, &c., 40 34 26 18 16

(Report of Commission, rec. pp. 30-31. Ex. 4, rec. pp.

1011-1012. McVann, rec. p. 7623.)

That all goods from East consigned to Pacific Coast

Terminals, Oklahoma common points, El Paso and Texas common points and Montana and Spokane common points, taking the class rates, are carried from Chicago to Missouri River crossings at rates much less than the rates ordered by the Commission.

Rates ordered by Commission between the Rivers are:

51 38 30 23 19 Portion Chicago to Mississippi River,

14.7 12.6 9.6 6.7 5.6

Total Chicago to Missouri River,

65.7 50.6 39.6 29.7 24.6

If order of Commission goes into effect it will leave a rate from Chicago to Omaha, St. Joseph and Kansas City nearly 100 per cent higher than existing Pacific Coast rates; more than 50 per cent higher than Montana and Spokane common point rates; and 33 per cent higher than the Oklahoma and El Pase and Texas common point rates; all hauled in same trains, on same railroads, with same train crew and at same actual cost of haul. (rec. pp. 27, 34. Ex. 4, rec. pp. 1011-1012. McVann rec. pp. 776 782, 783.

Tenth. The railroad companies make a margin of "some profit" on the Pacific Coast rates between Chicago and the Missouri River of 33 cents and likewise upon the Montana and Spokane rates, and the Oklahoma rates, and the El Paso and Texas common points rates (Ans. C. B. & Q. Ry. Co., rec. p. 991. Crosby, rec. p. 946.) The present portion of the rates from Chicago to the Missouri River is 41 cents higher than the Pacific Coast rates or a profit of 125 per cent, and represents 50 per cent profit over the Oklahoma and El Paso and Texas common points rates, and more than 75 per cent profit over the Montana and Spokane common points rates (Bell, rec. p. 802.) and Mr. Biddle of the Rock Island says that a rate which yields 50 per cent profit "is too large, of course." (Biddle, rec. p. 866.)

Eleventh. The earnings per ton per mile are greater on the railroads between Chicago and the Missouri River cities than on the lines east from Chicago. The 40 cent scale from Chicago to St. Paul and Minneapolis yields a profit per ton per mile of 1.9 (1 cent 9 mills), and on the lines east from Chicago 1.6 (1 cent 6 mills) (Bell, rec. p. 803), being a profit of 19 per cent in faver of the railroads west of Chicago as against the roads east from Chicago. (Bell rec. p. 804.) The freight rates per ton per mile on the roads west of Chicago are greater than on the roads east from Chicago. (See table rec. p. 1020.) The revenue per ton per mile is greater on the roads west from Chicago than on the roads east from Chicago. (See table rec. p. 1021.)

Twelfth. The rates on dry goods from Chicago to Omaha, St. Joseph, and Kansas City, notwithstanding the growth of said last named cities in population and business and notwithstanding the increased railroad facilities and increased railroad competition, and more economic management, and lessening of the cost of transportation, has remained substantially the same for the last twenty years. and were in fact higher at the time of the hearing than they were in 1888. Twenty-five years ago the rate was \$1.37 and was later advanced 5 cents and afterwards advanced to \$1.47. (Byrne, rec. p. 738) The tonnage is from ten to fifteen times more than it was twenty years ago (Smith, rec. p. 754), and notwithstanding the wonderful increase in tonnage the rates are higher now than they were fifteen years ago. (Hundley, rec. pp. 898, 899. McVann, rec. p. 785. Ex. 8, rec. pp. 1036-1039.)

We submit that there was ample evidence before the commission to justify it in finding that the through rates from the Atlantic Seaboard to the Missouri River cities were too high and in the reduction of the rates between the

Rivers because they were too high.

III.

The Order of the Interstate Commerce Commission Complained of does not Give any Undue or Unreasonable Preference to the Atlantic Seaboard, or to Missouri River Jobbers Over the Cities of Chicago or St. Louis, nor Subject the Cities of Chicago or St. Louis to any Undue Prejudice or Disadvantage.

The Commission did not order that the railroads should continue to charge the Chicago and St. Louis shippers the rates now charged. If the railroads do so continue the present charge to Chicago and St. Louis shippers it is the voluntary act of the railroads and not the order of the Commission. How, therefore, is the order unlawful?

Mr. J. M. Johnson, Vice-President of the Missouri Pacific, testified that in his opinion if the order of the Commission should be enforced the commercial development of St. Louis would be retarded to a very great extent and that her merchants would not continue to handle the same amount of business for the reason that the merchants in the east would have an advantage over them. (rec. pp. 161-162.)

Mr. George H. Crosby, Traffic Manager of the C. B. & Q., testified that the business of St. Louis has been built up on the present basis of rates and that if the order of the Commission should be enforced that the margin in the rates would enable the seaboard to control the business. (rec. p. 193.)

Mr. Frank P. Eyman of the C. N. & W., testified that the present system of rates has had a very beneficial effect upon the commercial development of Chicago and St. Louis; that if the order of the Commission should be enforced it would mean a reduction of nine cents per 100 first class on Atlantic seaboard business to Missouri river cities, and if carried out to its logical conclusions would be injurious to the business of Chicago and St. Louis. (rec. pp. 208-209.)

Mr Crosby and Mr. Eyman are directly contradicted by experienced merchants, Mr. Hillman of Claffin & Co. of New York (rec. p. 603), Mr. Campbell 37 years practical experience (rec. p. 574), Mr. Mack of Austin Nichols & Co. (rec. p. 613), Mr. Gomersall who had been traffic man for over 20 years and for Austin Nichols & Co. for 6 years (rec. pp. 621, 622), Mr. Jones, of Boston, President of Commonwealth Shoe & Leather Co. (rec. p. 648.)

What was said by these three traffic men were but expressions of opinion. They are not merchants engaged in business in either of said cities and do not profess to any knowledge based upon business experience. The subject matter is not one for expert evidence and if it were, these men are not experts on the business and commercial interests of the said cities.

There is no proof or claim made in the evidence that the rates ordered by the Commission are not reasonable and compensatory. The inquiry in this branch of the case is limited to the single question whether the effect of the order of the Interstate Commerce Commission is to give "undue or unreasonable preference or advantage" to the Atlantic Seaboard shipments of goods consigned to Missouri River cities over the cities of Chicago and St. Louis, or subjects the cities of Chicago and St. Louis, as localities, to any "undue or unreasonable prejudice or disadvantage" within the meaning of the Act to Regulate Commerce.

The low through rates from the Atlantic Seaboard to St. Paul and Minneapolis via Chicago, furnishes an answer based on practical experience to the non-expert opinions of the railroad traffic managers.

Said reduced rates to St. Paul and Minneapolis were voluntarily put in by the railroad companies and has been in force many years, yet no traffic manager or merchant of the city of Chicago testifies that the said rates to St. Paul and Minneapolis discriminate against, or has injured or damaged the business of Chicago as a locality, or the business of any individual merchant in said city.

The said traffic managers over-looked the important consideration that Chicago and St. Louis have been built up by the wealth, trade and commerce which they draw from the central and western portion of the country, and are not dependent upon the shipments which come from the Atlantic seaboard and reshipped to the Missouri river cities.

Exhibits 15, 16, 17 and 18, (rec. pp. 660, 666) set forth the enormous business transacted at Chicago coming from the surrounding agricultural states. The Chicago Board of Trade report for the year of 1907 in speaking of said business, said:

"'The grain, provision and live stock business here transacted, constitute the foundation of CHI-CAGO'S growth, even as the agricultural resources of the entire country are the basis of the nation's wealth.' p. XXVI."

Chicago is a great lumber market and in 1907 received 2,479,458,000 feet. Chicago on account of its nearness to the mining and lumber regions has become a great manufacturing center. Its manufactured products in 1905 amounted to \$955,036,277. Capital invested, \$637,743,474. Number of employees, 282,260. Chicago in

1907 milled 1,000,000 barrels of flour and received from other mills 9,435,311 barrels of flour. Its elevators have a capacity of 22,500,000 bushels. Add all these together, the flour mills; the elevators; the receipts and shipments of grain and of live stock; its packing houses; its implement factories and the multitude of other industries that are necessary thereto, and the hundreds of thousands of men necessarily employed, and we have an appreciation of what has made Chicago a great railroad, manufacturing and business center. It is beyond injury from Atlantic Seaboard competition.

We reach the conclusion that its commercial business when compared with its other business is only of comparative importance, and that the goods handled by its commercial houses are but little more than are essential to home consumption. In no sense of the word is Chicago dependent upon the shipments which come to it from the Atlantic Seaboard and re-consigned to the Missouri River. A reduction of 9 cents per hundred pounds on such shipments, first class, between the rivers when compared with the business we have above mentioned is not worthy of consideration. It is too insignificant, and can at most only effect such a limited amount of business, and the profit or losses of such a small number of men out of the great population of the city, that it cannot be said to be injurious or damaging to Chicago as a locality.

There is in the record an exhibit headed "Western Trunk Line Committee Annual statement showing proportion originating in seaboard territory of tonnage destined to Missouri River points during the year of 1906." (One of the exhibits in the record p. 1040.) Said exhibit was pre-

pared by James V. Mahoney, chairman of the Western Trunk Line Committee. It appears from said table that only 10½% of the entire tonnage carried over the western railroads and destined to southwestern points, and only 6 8-10% destined to the Omaha group points, comes from the Atlantic seaboard.

The table includes the percentage on all business from the Atlantic Seaboard, whereas a casual observation of the said table will show that less than one-half of the tonnage from the Atlantic Seaboard is included within the first five classes. Therefore, the amount of tonnage between the rivers which is effected by the order of the Commission is less than five per cent. It cannot be said that Chicago and St. Louis are dependent upon tonnage from the Atlantic Seaboard when less than 5 per cent of the tonnage from the said cities and between the rivers comes from the Atlantic Seaboard. Here is an affirmative showing by figures tabulated by the representatives of the railroads that, on an average, more than 95 per cent of the tonnage between the rivers is uneffected by the order of the Commission.

When we reduce that five per cent of the total tonnage to the simple incidental reduction 9 cents per hundred weight on the first class, it becomes a mere bagatelle, too indefinite, uncertain, intangible and conjectural to be made the basis for an expression of opinion by a railroad traffic manager that it would be disastrous to the commercial interests of the said cities.

Chicago and St. Louis by the present structure of railroad rates from both the east and the west are the most favored cities in the United States and all other territory has been made tributary to them by the voluntary action of the railroads.

The rates from the Atlantic Seaboard to Chicago and St. Louis are less than the sum of the locals in and out of the intermediate cities. The rates from the Pacific Coast terminals to Chicago are less than the sum of the locals in and out from the Missouri River cities. The through rates from the Pacific Coast terminals to Chicago and St. Louis are the same as the rates from the Pacific Coast terminals to Omaha, St. Joseph and Kansas City, notwithstanding the fact that there is nearly five hundred miles additional haul from the Missouri River cities to Chicago.

Mr. McVann, a railroad freight rate expert, testified that the through rates from New York to Chicago or St. Louis exceeded the sum of the local rates in and out of the intermediate cities. He illustrated this by statements of rates in and out of various cities. (rec. pp. 473-477.)

St. Louis has a freight rate advantage on goods from New York over Pittsburg to the amount of 13½c per cwt. first class; over Cleveland of 17½c per cwt. first class; over Detroit of 17c per cwt. first class; over Indianapolis of 20c per cwt, first class; over Cincinnati of 18c per cwt, first class.

The same general advantage is enjoyed by Chicago on merchandise from New York over the cities of Buffalo, Detroit, Cleveland, Toledo, Columbus, Indianapolis, &c.

The witness prepared a table, defendant interveners' exhibit No. 1, which shows that the existing through rates from New York to Chicago and St. Louis or Mississippi river crossings, are a greater discrimination against intermediate cities and in favor of Chicago and St. Louis than the rates ordered by the Commission would be as against Chicago or St. Louis, and that the rates from New York

to St. Louis or Mississippi river are not made up of the sum of the locals. (rec. pp. 478-485.)

The order of the Commission would make the through rate less than the in and out rate via St. Louis 9 cents and via Chicago 16 cents; while St. Louis now has 20 cents advantage as against Indianapolis and 18 cents as against Cincinnati; 17½ cents as against Cleveland and 17 cents as against Detroit, and Chicago enjoys the same relative advantage in rates over intermediate cities.

Put in other words, the railroad companies have themselves put into force and maintained a rate structure which has in it greater inequalities, if they can be called such, and greater features of discrimination, if they can be called such, than the order of the Commission which the complainant railroad companies are asking a court of equity to enjoin.

Chicago and St. Louis Have the Same Through Rates on Staple Articles From the Pacific Coast Terminals as the Missouri River Cities, Omaha, St. Joseph and Kansas City Have, Notwithstanding the Longer Haul to Either Chicago or St. Louis.

Mr. McVann prepared a statement and map showing the advantages which Chicago and St. Louis enjoy under existing rate structures over Omaha, St. Joseph and Kansas City. (rec. p. 484). The statement on the right hand of the map shows the advantages which Chicago and St. Louis enjoy by reason of through rates from the Atlantic seaboard. The statement on the left hand of map shows the advantages which Chicago and St. Louis enjoy by reason of through rates from the Pacific Coast. Said figures were tabulated from the tariff sheets, and their

correctness is not challenged in the record. By way of illustration St. Louis enjoys an advantage of 35c and Chicago 45c on lemons per cwt. over Missouri river cities from Pacific Coast terminals. On California wines St. Louis enjoys an advantage of 45c and Chicago 65c per cwt. over the Missouri river cities. Similar advantages in rates exist in favor of Chicago and St. Louis on the whole list of articles tabulated under the head of groceries, drugs, chemicals, boots and shoes, dry goods and clothing and miscellaneous articles set down in exhibits from 3 to 12 inclusive. (rec. pp. 490-519.)

Omaha, St. Joseph and Kansas City merchants by reason of the rates set down in the said statements, are shut out of the territory east of the Missouri river on all staple articles that come from the Pacific Coast and are likewise shut out of all territory east of the middle of Iowa on all articles that come from the Atlantic seaboard. The merchants of Chicago and St. Louis enjoy a monopoly of the Mississippi valley and as far east as Ohio, and have an equal advantage with the Missouri river cities in all the territory west to the Pacific Coast. This is so because the rates are "practically speaking the same from Chicago and St. Louis" to the Pacific Coast as they are from the Missouri river cities. (rec. p. 485.)

Mr. McVann prepared another statement showing the rates from the Pacific Coast terminals on grocery and commission goods, the list covering three pages, (Exhibit 3, rec. pp. 490-492) from which it appears that the through rates for the longer haul to either Chicago or New York are the same as for the shorter haul to Omaha, St. Joseph or Kansas City.

Mr. McVann prepared another table, (Exhibit 4, pp. 495-497) showing the additional amount of rates to be

paid when the same goods are re-handled at the Missouri river cities. Similar tables will be found relating to goods handled by druggists and chemical houses; (Exhibit 5, rec. pp. 499-501) and; (Exhibit 6, rec. pp. 504-505) and by boot and shoe houses; (Exhibits 7 and 8, rec. pp. 507-509) dry goods and clothing; (Exhibits 9 and 10, rec. pp. 511-513) and on miscellaneous articles; (Exhibits 11 and 12, rec. pp. 515-518.)

To the point that the present system of rate making shuts the Missouri River cities out from all eastern trade and gives Chicago and St. Louis a monopoly of the interior trade and equal advantage in the west, McVann testified:

(rec. pp. 542-3.)

"The ability of the Missouri River jobber to do business to the east of the Missouri River * * * is very limited." "The Omaha jobber rarely, as far as my knowledge goes, gets over a hundred miles east of the Missouri River as a general proposition." "In going east of course he gets the competition of Chicago. Milwaukee, St. Louis, Peoria, Davenport, Dubuque and other points which are coming west to meet him and the freight situation cuts a figure Take the case of the transcontiimmediately. nental business." "The Chicago or St. Louis merchant paying the same freight into his warehouse from California as the Omaha merchant pays, can reach out very far towards Omaha in the distribution of his goods. On business originating at the Atlantic Seaboard" "the Omaha merchant must pay the freight from New York or Pittsburg or Cleveland or Chicago." "His ability to reach east is practically nothing as against that of the Chicago or St. "Q. The result of that Louis jobber." is then that the Chicago or St. Louis man, under the present existing rate system, has a practical monopoly of the surrounding territory and of the territory west until you approach a territory

within about a radius of a hundred miles of the Missouri river?" * * * "A. As against the Missouri River jobbers that is true." Then applying further the principle that the railroads speak of, the in and out rate, Chicago and St. Louis shut the Missouri River jobbers out of all territory practically east of the Missouri River and leave Chicago and St. Louis on an equal plane with our Missouri River jobbers in all territory west of us? A. Equal or Q. Take it all in all Chicago and St. better. Louis enjoy at the present time a great advantage, all things considered, over the Missouri River jobbers? A. It seems to me that they do as a proposition on business from the west and from the east both. I think they enjoy a great advantage."

If there should be applied the same principle of rate making from the Atlantic Seaboard to Omaha, St. Joseph and Kansas City, as the railroads by their rate structure have applied to Chicago and St. Louis on business from the Pacific Coast terminals, then Omaha, St. Joseph and Kansas City, should have the same rate on shipments from Atlantic Seaboard as Chicago and St. Louis. If that principle of rate making which the railroads have constructed for business from the Pacific Coast should be applied to business from the Atlantic Coast, the railroad companies confessedly would have no case in this court.

IV.

Dry Goods.

The Reduction in Rates Ordered by the Commission will Not Unduly or Unreasonably Injure or Damage the Dry Goods Business of Chicago or of any Other Intermediate City.

Mr. Hauxhurst is the only representative of the dry goods business who appeared as a witness for the complainants. He testified that the chief competitors of Marshall Field & Co. are in New York City, and that the order of the Commission would have a detrimental effect on the business of Marshall Field & Co., and a moral effect on the minds of the buyers. A person starting in on a new business would naturally inaugurate it at the Seaboard in order to get advantage of the rates ordered by the Commission. (rec. pp. 350-2.)

On cross examination Mr. Hauxhurst said the reduction of 9 cents a hundred pounds would not be at all detrimental to any business Marshall Field & Co. have with the Missouri River jobbers who were petitioners before the Interstate Commerce Commission; and that he could not give the name of any merchant in Omaha, St. Joseph or Kansas City to whom Marshall Field & Co. sell goods. (rec. pp. 364-5.)

There is no testimony as to the quantity or kind of dry goods received by Marshall Field & Co. from the Atlantic Seaboard and resold at or west of the Missouri River, nor as to the value, or profits of said business, nor the amount of losses that would result from the reduced rate. Neither was there any mention of the advantages which Marshall Field & Co. enjoy in their western business over their New York competitors. No other witness was called by the Railroads to support Mr. Hauxhurst.

Mr. McVann testified that the dealers in dry goods in Chicago and St. Louis have an advantage over the intermediate territory east of them. This is because merchants at Detroit or Cleveland or Cincinnati cannot ship from New York and then reship to Chicago and St. Louis as cheaply as a Chicago or St. Louis man can get the goods direct from New York. (rec. pp. 525-6.)

Mr. Campbell, a dry goods merchant of thirty-seven years' experience, testified the reduced rates ordered by the commission would not be detrimental to the "dry goods houses of Chicago or St, Louis," and gave several reasons therefor. (rec. p. 574.)

- (a) Western houses are demanded by increased population, for quick delivery and for economical reasons. (rec. p. 575).
- (b) This law of trade has decreased the dry goods business from New York City and many New York jobbing houses have gone out of business. (rec. pp. 574-5.)
- (c) A reduction of 9 cents on the through rate would not enable the Atlantic Seaboard dry goods jobbers to regain the business. (rec. p. 575.)
- (d) New York jobbing dry goods houses sell their goods in seaboard territory and do not sell goods to the general trade in the west. (rec. pp. 575-576.)
- (e) St. Paul and Minneapolis have an advantage of 32 or 33 cents per cwt. over Omaha, St. Joseph or Kansas City on the through rates, and on a business of \$5,000,000.00 a year have an advantage in profits of \$40,000.00. (rec. p. 577.)
 - "Q. State whether a reduction of 9 cents per hundred on first class from the Atlantic Seaboard to the Missouri river would or would not tend to the establishment of new jobbing houses in the dry goods

line in the Atlantic seaboard territory? A. I am satisfied it would not establish a single one. Q. What would you say as to its effect upon dry goods houses already existing in the city of Chicago or St. Louis? A. I do not believe that a 9 cent reduction would make any difference whatever in the dry goods business." (rec. p. 575.)

Mr. Hillman of H. B. Claffin & Co., Dry Goods Jobbers, New York City testified that he is familiar with the dry goods business of New York City and of the Missouri river cities, and that the development of the western country in population and wealth has circumscribed the territory within which eastern dry goods houses do business. By reason of this fact within the last 20 years many New York dry goods jobbing houses have gone out of business and only two houses remain in Philadelphia.

(rec. pp. 601-602.)

Can you give the names of some houses that have gone out of business? A. The most notable ones are Bates, Read & Cooley, E. S. Jaffray & Company, Sweetzer, Pembroke & Company, Hilton Hughes & Company who were successors Q. Conceding my to A. T. Stewart. statement of the reduction to be correct on through shipments from the Atlantic Seaboard to the Missouri river I wish to ask you whether in your opinion that limited reduction will in anywise materially affect or enlarge the territory within which a jobbing house in New York City might do or extend its business, and whether such reduction would enable New York houses to increase their business or the area of their territory to the detriment of such a house as Marshall Field & Company, which I name as an illustration? A. I do not think it would have the slightest effect."

The attention of Mr. Hillman is called to the testimony of Mr. Crosby of the C. B. & Q., and of Mr. Eyman

of the C. & N. W., that the reduction in rates ordered by the Commission would have a tendency to transfer the business from the Atlantic seaboard to the detriment of the Commercial business of Chicago or St. Louis and testified that in his opinion the reduction would not have that effect, and he could not possibly see it in that light. (rec. p. 603.)

Again Mr. Hillman testified that the Chicago dry goods house has an advantage over New York in that the New York house pays the freight from the mill to New York City and thence the freight out to any point west, whereas the Chicago house pays but the single rate from the mill. (rec. p. 610.) The Chicago house has a great advantage on all import goods for the reason that the water and rail rate from Europe to Chicago or St. Louis is much less than the water rate to New York plus the rate by rail to the west. (rec. pp. 610-611.)

This advantage in rates to Chicago on imports over New York is sanctioned in *Texas & Pacific Railway Co.* vs. Interstate Commerce Commission, 162. U. S. 197.

The foregoing summarizes all of the testimony relating to the dry goods business. The preponderance of the testimony is that Marshall Field & Co. enjoy an advantage by reason of the cheap import rates, ocean and rail combined, over New York. Under existing conditions Marshall Field & Co. have grown to immense proportions since 1881, and within the same period of time the jobbing business from New York has been decreasing and many of its large houses have gone out of business. Marshall Field & Co. have no competitors at this time in New York City. The 40 cent scale from Chicago to St. Paul and Minneapolis on Atlantic Seaboard business has not injured Marshall Field & Co., neither has it permitted New York jobbing houses to compete with Marshall Field & Co. in the northwest.

V.

Wholesale Grocery Business.

The Reduction in Rates Ordered by the Commission will not Unduly or Unreasonably Injure or Damage the Grocery Business of Chicago or of any Other Intermediate City.

Mr. Jones of Franklin McVeagh & Co., wholesale grocers of Chicago, testified that his company did business in the Missouri River cities and to the west thereof; that the enforcement of the order of the Commission would handicap said house in the sale of goods in eastern Iowa. (rec. p. 378.)

On cross-examination Mr. Jones testified that about 30 per cent of the business of his company were local sales in the city of Chicago. (rec. p. 386.) The house sells groceries in the state of Illinois outside of the city of Chicago, the amount he could not state, but might not exceed 20 or 25 per cent of the entire business. (rec. p. 387.) The house also sells groceries in Wisconsin, Michigan, Indiana, Minnesota and the Dakotas, and that the greater part of the business of the company is done in the said states surrounding Chicago, but the witness could not state the per cent of business done in any of the said states. (rec. pp. 387-8.) The witness eliminated sugar and flour and all articles that were produced or supplied in the intermediate territory from the effect of the order reducing rates. (rec. p. 389.) The witness does not and cannot state what per cent of the goods handled by the company comes from the seaboard territory nor what per cent of the business of the company is reshipped to the Missouri River cities that could possibly be effected by the order of the Commission.

"Q. Then the long and short of this business is that

you cannot tell the percentage of your business in any line of goods whatever that comes from the Atlantic seaboard or anywhere else and goes to the Missouri River that would be effected by this reduction of rate? A. No, sir." (rec. p. 391.)

Manifestly, substantially all of the business of the house is done in the city of Chicago and in the surrounding states and a very small portion of the business, if any, goes west to the Missouri River cities, but of that limited business, whatever it may be, there is nothing to show what part of it comes from the Atlantic Seaboard, if any, nor to what extent, if any, said shipments would be affected by the rates ordered by the Commission. Mr. Jones is not supported by any other witness.

The Proofs are that Chicago Grocers Have an Advantage Over Grocers of Omaha, St. Joseph and Kansas City on Articles From the Pacific Coast Terminals and Have an Advantage Over Grocers in Seaboard Territory, and that After the Rates Shall Have Been Reduced as Ordered by the Commission that Chicago Grocers Will Still Have an Advantage that Cannot be Equalized by the Proposed Reduction in Rates.

Mr. McVann produced a table (Ex. 3, rec. pp. 490-2) showing a list of articles handled by grocery and commission houses, covering three pages, which come from the Pacific Coast terminals on which Chicago and St. Louis have the same rates as Omaha, St. Joseph or Kansas City. Mr. McVann produced another table on the same articles, (Ex. 4, rec. pp. 495-97) in which is computed the advan-

tage in rates which Chicago and St. Louis grocers have over Omaha, St. Joseph and Kansas City in the handling of said articles. From said table it appears that a grocery house in Chicago would have an advantage on lemons of 45 cents per cwt., on oranges, grape-fruit, limes, manderines, etc., 45 cents per cwt., on dried fruits, raisins, prunes, figs, etc., 32 cents per cwt., on liquors, 38 cents per cwt., and so on through the tabulated list.

It appears by testimony that will now be referred to that only 5 per cent of the goods handled by the Missouri River grocers comes from the Atlantic Seaboard, and a portion of that under commodity rates not affected by the order, and that a Chicago grocery house handles more groceries coming from the Pacific Coast terminals, on which they have the advantage stated supra, than they handle coming from the Atlantic Seaboard.

Mr. Hoel of McCord Brady & Co., wholesale grocers of Omaha, said that he had been in the business for thirty-three years and was familiar with the commodities handled by the Chicago grocery houses. Missouri River jobbers are limited in territory to Nebraska, Kansas, South Dakota, Wyoming, Utah and a part of Montana, and the western third of Iowa. The grocery business is localized by the necessity of being near the point of distribution, economy, expense and the time of delivery. Franklin McVeagh & Co. and other Chicago grocery houses do net sell groceries at all in the Missouri River territory. (rec. pp. 544-5.)

Groceries do not come from the Atlantic Seaboard and are not effected by the order of the Commission. Mr. Hoel said 95 per cent of the groceries handled by his company do not come from the Atlantic Seaboard. Cereals, (7½ per cent of the business), wheat, flour, corn, etc., come from

the Missouri River zone. Dried peas come from Wisconsin, rice from Louisiana and Texas, beans from Michigan and Wisconsin, lima beans from California. (rec. pp. 545-7.)

Sugar (about 22 per cent of business) comes chiefly from California, Utah, Colorado and Nebraska; some hard sugar from New York, but sugar in carloads takes commodity rates and is not effected by the order of the Commission. (rec. p. 546.)

Canned goods represent about 15 per cent of the business and come mostly from Illinois, Iowa, Nebraska, Missouri and Wisconsin. Canned fruits chiefly from California, canned meats chiefly from the packing houses at Chicago and on the Missouri River. (rec. p. 547.)

Tobacco (9 per cent of our business) is controlled by the American Tobacco Co. at a blanket price to all points of the country east of the Rocky Mountains, hence is not effected by the order of the Commission. (rec. p. 548.)

Domestic manufactures handled by grocery houses is 26 per cent of business, which includes matches, soap, crackers, salt, cigars, etc., have a common price and are not effected by the order of the commission. (rec. p. 549.)

Coffee comes by New Orleans or New York and takes a commodity rate, hence not effected by the order of the Commission. The purchases of McCord, Brady & Co. from the Atlantic Seaboard did not exceed 5 per cent of their total business. (rec. p. 549.)

Chicago grocery houses have an advantage over Missouri River grocery houses under rule No. 10 in the official classification which allows them to combine a large list of articles of first, second, third and fourth classes in single carloads at the fifth class rate from New York to

Chicago. Olives from New York to Chicago in mixed car, under rule 10, take fifth class rate of 30 cents per hundred lbs. L. C. L. Chicago to Missouri River 45 cents, total to Chicago jobbers on olives 75 cents per hundred lbs. The L. C. L. through rate on olives from New York to the Missouri River is \$1.23, thus giving Chicago an advantage of 48 cents per hundred lbs. on olives. On olive oil in tins Chicago grocers have an advantage of 30 cents per hundred lbs. For a list of articles which under rule 10 and rule 26 may be thus combined in a carload and take fifth class rate from New York to Chicago, see exhibit No. 14. (rec. p. 552.)

Chicago has another advantage which may be illustrated by Spanish olives, which are imported in casks to either New York or Chicago at a low rate. The same are bottled in New York or Chicago, as the case may be, and thence re-shipped to distributing point in glass bottles which take a higher rate, whereby Chicago has an advantage over New York. (rec. p. 554.)

Chicago sells some specialties under house brands in which they have no competition from anywhere, hence not effected by the order of the Commission. (rec. p. 554.)

Mr. Mack of Austin, Nichols & Co., of New York City, the largest grocery house in the world, testified: (rec. pp. 612-13.)

"Q. You may state if you please, from your knowledge of the business and from your experience, whether or not in your opinion that reduction would in any wise prove detrimental to the business of a wholesale house such as that of Franklin MacVeagh & Company in Chicago? A. It would not in my opinion. Q. You may state why not? A. That reduction in rate would be so small that we would not gain any advantage thereby." * * * "A. What is known as

private brands or as you call then, house brands. our house brands, do not go further west than Ohio to any extent. Q. Then putting it in another way, whether goods carrying your private brands are sold by you in the Missouri river ter-They are not. Q. Then next whether this reduction in rate, spoken of would enable you to sell those goods in the Missouri river zone or territory? A. I don't think so. The reduction is too small." me then state to you a fact, that the through rate from Atlantic Seaboard to St. Paul or Minneapolis is the rate from New York to Chicago 75 cents plus 40 cents first class, while the through rate from the Atlantic seaboard to the Missouri river cities is \$1.48. What I want to ask you is whether that lesser rate to St. Paul or Minneapolis, that rate being less than the rate from New York to the Missouri river points has enabled your house to sell your goods carrying your private brand into Minneapolis or St. Paul? A. We sell no goods to St. Paul or Minneapolis except some bulk olives."

Mr. Mack had his attention called to the statements of Mr. Crosby of the C. B. & Q. and Mr. Eyman of the C. & N. W. to the effect that the reduced rates would be detrimental to the commercial interests of Chicago or St. Louis, and was asked to state as a commercial man whether such result would follow and answered "it would not." (rec. p. 613.)

Mr. Mack further said that a Chicago house on imported goods "got cheaper freight rate direct from European countries" than the rate from Europe to New York plus the railroad rate from New York to Chicago. (rec. p. 613.)

Mr. Mack said from his experience in the mercantile business that Chicago and St. Louis by their nearness to the western market have an advantage over New York by reason of which New York can not compete with them in the "Mississippi river territory." A large percentage of articles handled by western houses are produced in the middle west; as to all such articles "the western house would have an advantage." (rec. p. 614.)

Mr. Gomersall, with traffic lines sixteen years, with a Steamship company three years, traffic manager for Austin Nichols & Co. of New York City six years, testified that this mercantile house did not ship groceries to any of the cities on the Missouri River. (rec. p. 619.)

"Q. I want to ask you from your knowledge what is your opinion as to whether or no if that reduction of rate should go into effect it would result to the detriment of wholesale grocery houses in Chicago or St. Louis, having in mind such a house for illustration as that of Franklin, MacVeagh & Co?" "A. I should say not."

In giving his reasons for the conclusion stated supra the witness stated that the greater portion of the goods handled by wholesale grocers for transportation to the west are not first class. For instance, olive oil, canned fish, fruits and vegetables take fourth class between the rivers. (rec. p. 620.)

"Q. Taking the reduction which would be on fourth class, state whether in your opinion that reduction in the cost of transportation would be sufficient to interfere in any way with the business of such a house as Franklin, MacVeagh & Co.?" "A. It certainly would not. It would be so small it would not be noticeable."

The witness set forth the advantages which Chicago has over New York on rates on imported merchandise by consolidation in carload lots under rule 5B. By such consolidation a long list of articles can be shipped from New York to Chicago at a rate of 30 cents per hundred pounds,

whereas the local rate from New York to Chicago on the same articles would be 75 cents or 88 cents to the Mississippi River. (rec. p. 620.)

On a through bill of lading from Europe, a Chicago house has an advantage on the through rate over shipments from the same points to New York and then reshipping by our house to Chicago. (rec. 621.)

"I want to ask you whether in your opinion if this order of the Commission should be put into force and effect any such result as that stated by Mr. Crosby would follow? A. No. This condition is not new. It is only presented in a new form." (rec. p. 621.)

"Q. I wish to call your attention to a statement made in this case by Mr. Eyman, Assistant General Freight Agent of the Northwestern, to the effect that if this order of the Commission reducing rates should go into effect it would be disastrous to the commercial interests of Chicago and St. Louis, and ask you to state whether in your opinion any such disastrous results would follow?

A. No, sir. For the reason before assigned." (rec. p. 622.)

"Q. What I want to ask you is whether the putting into effect of that rate from the Atlantic Seaboard to St. Paul and Minneapolis resulted disastrously or to the detriment of the commercial interests of the city of Chicago? A. No, sir. Q. Whether or not it gave the house you represent or other houses in New York such an advantage in selling goods to Minneapolis or St. Paul as to be detrimental to their competitors in Chicago? A. No, sir. Q. You may state whether or not as a fact if you know it enabled New York houses to go into St. Paul or Minneapolis which had not been there before? A. I do not think so." (rec. p. 622.)

Mr. Gomersall explained why New York could not sell groceries in Twin Cities notwithstanding the 40 cent

rate from Chicago. Foreign goods, such as olives, are imported on a through bill of lading to Chicago at an equal or less rate than we can get them in New York. They are bottled in Chicago, and the freight on glass bottles to Chicago is less than to New York. Chicago can receive olives in bulk on a basis of a 30-cent rate. Chicago re-ships olives to St. Paul at 30 cents, or a total of 60 cents from New York to St. Paul, while New York pays a through rate of \$1.15 per hundred pounds. The New York house will buy peas in Michigan and pay the freight to New York of 30 cents, and then pay the rate from New York to St. Paul, whereas a Chicago jobber can get the same peas from Michigan at 10 cents and re-ship to St. Paul at 25 cents. The same conditions apply to other articles.

Conclusions drawn from the evidence relating to wholesale grocery business.

Mr. Jones of Chicago is the only witness who testified for the railroad companies on this subject. St. Louis produced no witness.

Only 5 per cent of the grocery business consists of articles from the Atlantic Seaboard, and a part of that is made up of imported goods which reach either Chicago or St. Louis on a combined ocean and rail rate, less than the in and out rate from New York.

Nearly all of the staple articles handed by grocery houses come from the interior of the country. A greater portion come from Pacific Coast terminals than from the Atlantic Seaboard.

No witness claims that the 40 cent scale on the

through rate from Chicago to the Twin Cities, which has been in force fifteen years, has injured Chicago or has given any advantage to New York.

Under the above stated facts it does not appear to be possible that the reduction between the rivers as ordered by the Commission could injure the business of either Chicago or St. Louis. Certainly such fact is not established by the evidence.

VI. BOOTS AND SHOES.

The Rates Ordered By the Commission Will Not Injure or Damage the Boot and Shoe Business of Chicago or St. Louis.

Mr. Johnson, of Roberts, Johnson & Rand Shoe Co. of St. Louis, testified: (rec. pp. 322-3.)

"Q. You know the nature of the order of the Commission involved in this case? A. That a reduction between St. Louis and the Missouri River points of 9 cents be made. Q. In favor of —. A. In favor of points east of Buffalo and Pittsburg. Q. That is 9 cents on first class? A. That applies to everything we handle. We are hit on every corner. Q. You may state what the effect upon your business, and business conditions at St. Louis would be resulting from the enforcement of that order? A. That will have the effect of placing us at a disadvantage with every manufacturing point of importance in our line of business. Q. What will be the extent of the injurious effect? A. Take on the volume of our business and the differential as figured out and applying to the territory in which we do the larger volume of our business I should say it would place us at a disadvantage in about 70 per cent of our business."

On cross-examination Mr. Johnson testified: (rec. p. 324.)

"Q. What is the total value of your business in a year? A. About eleven million dollars. Q. I believe you said in your direct examination that on the existing rates you compete with shoe manufacturers the world over? A. We do. Q. You make a profit on your business? A. Yes, sir. Q. Nine cents on the hundred pounds would be less than a quarter of a cent on a pair of shoes wouldn't it? A. Yes, I should say it would not figure more than that."

Comment. St. Louis is one of the largest boot and shoe manufacturing cities in the United States, yet Mr. Johnson is the only representative of that large business to testify against the reduction of the rates.

- (a) It will appear that Roberts, Johnson & Rand Shoe Co. has an advantage over its seaboard competitors equal to the rate on the manufactured product from New England to the Mississippi River of 88 cents per 100 pounds and also a cheaper rate on raw material.
 - (b) This is so because the tanneries are in the west and the rate on the raw material is cheaper to St. Louis than it is to New England. The New England man in addition to paying more freight on the raw material must pay the freight on the manufactured product to the Mississippi River before he can start on an equality with St. Louis.

Mr. Culley testified that the principal tanneries are in the vicinity of Chicago and Milwaukee, and within the states of Illinois, Wisconsin and Michigan, and gives their names and locations, which list covers almost an entire page of the record. (rec. p. 571.)

Mr. Davis of Noyes-Norman Shoe Co., engaged in

the manufacture of boots and shoes for thirty years, said, he was familiar with that business generally in the city of St. Louis. Most of the hides come from the west and many of the tanneries are in the west, especially in Wisconsin. Leather produced in the middle west exceeds that produced in the east, and New England factories use a great deal of western leather. (rec. pp. 587-8.)

"Q. From your knowledge of the boot and shoe business what would be your opinion as to whether the reduction of rates as ordered by the Interstate Commerce Commission, being 9 cents on first class and in a reduced ratio including the five classes would in any important way interfere at all with the business of the St. Louis houses in their business in the Missouri river territory?" A. I do not believe that it would interfere with their business in any way."

Mr. Davis said the average value of boots and shoes per hundred pounds is \$50.00 and the reduction of 9 cents in freight cost would be one-sixth of a cent a pair or one cent on six pairs of shoes, too inconsiderable to effect the business of a St. Louis house. (rec. pp. 588-9.)

"Q. As a jobber and a merchant what would you say as to whether or not that would interfere with a firm in St. Louis in actual experience in the sale of goods in this Missouri river territory? A. I do not think it would be considered in a single instance." (rec. p. 589.)

Charles H. Jones, President of the Commonwealth Shoe & Leather Co., and Chairman of Traffic Committee of the New England Shoe & Leather Association, and Chairman of the Transportation Committee of the Boston Merchants' Association, testified that upper leather and calf skin used by his company came from Wisconsin. Twenty years ago such leather was made in New England, but the business has been transferred to the west

and to some of the southern states. Today there are no sole leather tanneries in New England. Kid leather comes from Wilmington and Philadelphia. Sole leather comes from the American Oak Leather Co., of Cincinnati, and some from North Carolina, West Virginia and Wisconsin. (rec. p. 664.) Leather is cheaper in Chicago than in Boston on account of the nearness of Chicago to the tanneries, and St. Louis has like advantage in the price of leather over Boston and New England. (rec. p. 644.)

Mr. Jones, speaking directly of Roberts, Johnson & Rand Shoe Co., said: (rec. pp. 645-6.)

They have an advantage in freight rate in proportion to the distance that their raw material comes as compared with ours and also the fact that our finished product must pay the freight clear to its destination and they are practically at its destination when they start. Take St. Louis as the destination for the moment, the first class rate from the Atlantic seaboard to the city of St. Louis is 88 cents per hundred. Let me ask you whether boots and shoes take the first class? A. Yes, sir. Q. So a house like Roberts Johnson Rand Shoe Company in St. Louis would have an advantage over you of 88 cents per hundred on the manufactured product? A. Yes, sir. Q. And the additional advantage whatever that may be of the lesser freight on the raw material? A. Yes, sir. Q. Assuming that the rate from the Atlantic seaboard to the Missouri river cities such as Omaha, St. Joseph and Kansas City is \$1.48 per hundred pounds, and the order of the Commission reducing that rate 9 cents per hundred pounds, I ask you to state in your opinion whether that reduction of 9 cents per hundred pounds first class would or would not operate to any disadvantage to a house in St. Louis such as Roberts Johnson & Rand Shoe Com-

pany so as to have any deterrent effect upon the business of that house? A. I cannot see that it would in the slightest degree." * * "Q. I desire to call your attention to another fact, towit, that Mr. Johnson said in effect that if this reduction in rates went into force it would place his house at a disadvantage in about 70 per cent of its business. I will ask you what the facts are as to that so far as your knowledge goes? A. I cannot conceive of its putting his house at a disadvantage in any respect at all. I cannot see anything in it. I think I know the locality where he sells his goods and I think that he has an advantage in that region and would maintain it in that region if this rate were reduced five times as much as they talk about reducing it. If the rate from Boston for instance was 25 cents a hundred to the Missouri river we could not interfere with Mr. Johnson's business in those points. Q. In a general way you may give your reasons for that statement? A. This concern in St. Louis has so many other advantages that New England could in no way offset, that he would still hold the business if the freight rate from Boston was 25 cents. We sold these people in St. Louis formerly, before they had their factories, practically all the goods that they used of our kind of goods. Today we sell them nothing at all except things they cannot make. No freight rate would overcome the other manifest advantages that they have. It might be an assistance to the Missouri River people in paying the freight on our stuff that they cannot buy in St. Louis, but just as fast as St. Louis develops its factories so that it can make these various kinds of goods they will take that business away from us too. You might state what has been the effect in the last ten or twenty years upon the boot and shoe business of New England by reason of the development of these western industries in a similar line? A. You may take the cities of Chicago, St. Louis, Kansas City and Omaha and,

I did not prepare myself with any statistics, but I will say roughly they are manufacturing today fifty million dollars a year worth of shoes than fifteen years ago were all made in New England; and that business can never come back to New England." (rec. pp. 646-7). * * * "Of course a rate 9 cents less would do no harm to a manufacturer on the seaboard but it would not be a factor of sufficient importance to make him sell one pair more or less of shoes in that territory, and there would have to be other reasons beyond that to make any change at all." * * * "I do not think it would affect the sale of a single pair of shoes one way or another. It would have to be reduced very much more than this to make any perceptible effect. (rec. p. 648.)

The above excerpts are but the substance of what this witness said on certain points relating to the boot and shoe industry applicable to this case. The testimony is important by reason of the intimate and complete knowledge of the witness with the subject and establishes the fact that Roberts, Johnson & Rand Shoe Co., (the only shoe company that complains of the reduced rate), has a general advantage over New England to the full amount of the rate on the manufactured product from New England to St. Louis, to-wit: 88 cents per 100 pounds.

Conclusion. Mr. Johnson of St. Louis omitted to state or consider the fact that the tanneries were in the middle west and leather shipped from there to New England, and omitted to take into consideration the further fact that the New England factory paid a higher rate on raw material than he did, and then paid 88 cents per hundred pounds on the manufactured boot and shoe from the seaboard to St. Louis.

Mr. Johnson further omitted to show that by reason of these advantages enjoyed by Chicago, St. Louis, etc., said cities were manufacturing fifty million dollars worth of boots and shoes per year which had formerly been manufactured in New England.

VII.

PAINTS AND VARNISHES.

The Rates Ordered By the Commission Will Not Damage the Business of Cleveland.

Mr. Evans, was the only witness called by the railroad companies who testified that the rates ordered by the Commission would produce injury to Cleveland. He is connected with Sherwin-Williams Co. and spoke only of paints and varnishes manufactured by his company which has a factory at Cleveland and at Kensington (Chicago), and factories at Newark, N. J., and Montreal, Canada, which takes seaboard rates and therefore not affected by the order of the Commission. (rec. p. 253.) He said rates on raw material brought in from the seaboard and manufactured products take fourth class rate, and a differential of 4 cents between the rivers would close the factories west of Buffalo "if such competition were strong enough or cared to control the entire output." (rec. pp. 253-254.)

"Do you know anything about the profit of the business? A. Nothing." * * * "Q. What is paint worth a hundred pounds? A. I could not tell you." * * * "Q. What is the rate on raw material into Cleveland? A. Twenty-five cents. Q. On a hundred pounds? A. Yes, sir. Q. What is your rate out to the Mississippi River? A. Fifty and a half cents." * * * "Q. To begin at the basis of this, what is the rate on your

raw material into Cleveland? A. Twenty-five cents. Q. From the seaboard? A. Yes. Q. Your rate from Cleveland on the finished product to the Mississippi river is how much? A. Twenty-three cents. Q. Which makes fortyeight cents? A. Yes, sir. Q. What is the fourth class rate on seaboard freight to the Mississippi River crossings? A. I think it ought to be 40½ or 41. Q. You don't know what the margin of profit is at all, do you? A. No, sir." * * "Q. You do not know anything at all about the cost of production, the selling price, the revenue derived, the income, the financial standing at all of your concern in its business? A. No, sir." * * "You have a factory in the seaboard territory? A. Yes. It takes the seaboard rate? A. Yes, sir. You have two factories in seaboard territory, Montreal takes the seaboard rate, doesn't it? A. Yes." (rec. pp. 254, 255, 256.)

It appears as a matter of fact that the raw material which enters into paints, which composes about 70 per cent of the product, is found in the locality of the Cleveland factory, and does not come from the Seaboard, and the only imported article used in varnishes is crude gums. (rec. p. 262.) The witness's attention is called to these facts and thereupon he testified the lead used comes "from Coffeyville, Kansas." (rec. p. 256.) White lead takes sixth class and there is "no reduction on that," and west of the rivers takes "commodity rates." (not covered by the order of the Commission.) (rec. p. 258.)

"A. The crude materials from a paint standpoint are under commodity rate. The zinc oxides are. The leaded zincs are. Q. Name what else is under commodity rates? A. The linseed oil between the rivers is. Q. Give what else is under commodity rates? A. That covers the basis." (rec. p. 258.)

Sherwin-Williams Co. have competitors in the "East and at St. Louis and Chicago" * * * "and Detroit" which would be affected by the order in the same relative proportion as Cleveland. (rec. p. 259.)

"Q. So that you would be in the same relative standing under the Commission's order as prior thereto? A. Yes, sir." (rec. p. 259.)

The eastern competitors must import raw crude gums from the same sources.

Mr. Evans was the only witness to the effect on this business or injury to the locality of Cleveland. It appears fr m the defendant's testimony that the Cleveland factory has an advantage over all Seaboard territory by saving of freight rates on raw material greater in amount than the rate on crude gums from the Atlantic seaboard, and furthermare, that there is a profit from 100 per cent to 400 per cent on varnish, the only article in which the crude gums are used.

Mr. McVann testified with reference to the business of Sherwin-Williams Company: (rec. p. 541.)

"It would not be a question of the rate from Newark, New Jersey, to Cleveland plus the rate from Cleveland to Omaha, but it would be a question of where the Cleveland man gets his raw material and how much it costs him to lay it down in Cleveland, and not the question of the sum of the rate from New York to Cleveland plus the rate from Cleveland to Omaha. If Cleveland had paid a short rate on it to Cleveland that would affect materially his freight cost as against that of the Newark manufacturer who he said was his competitor."

Mr. Nugent who has had thirty years' experience in the manufacture of paints and varnishes in New York, Pittsburg, Cleveland, Chicago and Omaha, testified that he was familiar with the Sherwin-Williams Paint Company of Cleveland: (rec. pp. 565-566.)

"Q. Do you know the different factories owned by the Sherwin Williams Company aside from the one at Cleveland? A. Yes, sir. Q. Do you know of their factory at Montreal, Canada? A. Yes, sir. Q. Have you at any time seen that plant and been through it? A. Yes, I had charge of it one time temporarily and I sold it. Q. Do you know of the plant of the Sherwin Williams Company at Newark, New Jersey? A. Yes, sir."

Sherwin-Williams Company get their linseed oil from "the Cleveland Linseed Oil Company," located about "three hundred feet" from their factory.

How close is that linseed oil mill or factory to the factory of the Sherwin Williams Paint Company? A. I couldn't say how many hundred feet it is. It is probably about three hundred feet from it. Q. Do you know whether that oil mill is of sufficient capacity to supply the Sherwin Williams Company with such linseed oil as they need? A. It always has been more than they could use. Q. Let me ask you as to some of the other linseed oil mills. What about Minneapolis? A. They turn out a great quantity of oil. Q. Is Minneapolis regarded as one of the chief sources of supply of linseed oil? A. Yes, sir, it is. Q. Are there any linseed oil mills in Chicago? A. Yes, sir. How far removed are they probably from the Kensington factory of the Sherwin Williams Company? A. They are about 22nd Street. There is one, Wright & Lawther mill on 22nd Street. It is the distance from there to Kensington. 22nd street I think is the nearest mill to them. Q. It is how far? A. Five or six miles."

There is a factory for carbonate of lead in the city

of Cleveland, called The Morley White Lead Company, and also "in Buffalo, Chicago and that vicinity. (rec. p. 567.) Oxide of zinc used in paint, comes from Colorado and Joplin, Missouri. (rec. p. 568.)

"So the raw material for the oxide of zinc is also a western product? A. Yes, sir. Q. Are those three things, linseed oil, carbonate of lead and oxide of zinc the three principal elements which enter into the manufacture of paint? A. Yes, sir."

In the manufacture of varnish the principal articles used are gums, linseed oil and turpentine. The gums are found principally in New Zealand. Sherwin-Williams Company "get their linseed oil in their own town within three hundred feet of their own factory." Turpentine comes from Savannah and Pensacola. Fifty per cent (50%) of the material in all higher grade varnishes is made up of crude gums, the remainder of turpentine and linseed oil. In the cheaper grades the percentage of gum decreases and turpentine and linseed oil increases. (rec. p. 568.)

"Then the cheaper grades of outside varnish are composed of what chiefly? A. Resin and gum together. Q. In that is there practically any gum whatever? A. Hardly any. What we cal furniture varnish. I —— Q. In that sort of varnish how much gum is there if any at all? A. About ten per cent. Q. And the remaining 90 per cent is what? A. May be resin, turpentine." (rec. pp. 568-569.)

For the inside varnish gums compose "less than onethird of the entire product." (rec. p. 569.)

There are "seven and a half to eight pounds" of varnish in a gallon, or "twelve gallons to a hundred pounds in weight." It costs about 50 cents per gallon to manufacture. (rec. p. 569.)

"Would 50 cents be about an average of the cost? A. Yes, sir. Q. That would be then a cost of about \$6 for a hundred pounds of varnish. A. Yes, sir. Q. That sells in the market for about what price? A. One dollar. Q. One dollar a gallon, or \$12 for a hundred pounds? A. Yes, sir. Q. That is 100 per cent profit over the cost? A. Yes, sir. Q. Then on that \$6 of profit, even first class, a reduction of 9 cents on the hundred pounds even though it were shipped from New York would still leave \$5.91 profit on a hundred pounds of varnish? A. Yes, sir." (rec. p. 569.) * * * "Q. On the higher grades the price is how much a gallon? A. About four and a half or five dollars." (rec. p. 570.)

It appears that in some of the higher grades of varnish there "would be two or three or four hundred per cent profit." The witness in speaking of the location of the Cleveland factory said: (rec. p. 570.)

"They are certainly a well located factory. Could not be more convenient possibly."

The Sherwin-Williams Co. do not again appear as witnesses to contradict or rebut any of the statements made by the witness Nugent. His statements must be accepted as true. The results are as follows:

- (a) The Sherwin-Williams Company gets substantially all of its raw material from the middle west. Its factory at Cleveland has an advantage over all its eastern competitors by reason of its location near the source of supply of the raw material.
- (b) Its percentage of gum used is but nominal compared to its general business.
- (c) From its Montreal and Newark houses it can take advantage of the reduced rate between the rivers on equality with its eastern competitors. On the business from its Cleveland house it has the advantage in the dif-

ference in rates from New York to Cleveland on the manufactured product.

- (d) It has the advantage over its New York competitors in the difference of the rate on the raw material from Cleveland to New York.
- (e) It still has a profit of \$5.91 per hundred pounds after the reduction in rates and a profit of from 400 to 500 per cent on the higher priced grades of varnish.

VIII.

The Order of the Commission Will Not Unduly or Unreasonably
Injure or Damage the Business of Whitelaw Bros., of
St. Louis, As Jobbing and Commission Merchants in
Heavy Chemicals.

Mr. Whitelaw, of Whitelaw Bros., St. Louis, jobbers and commission merchants in heavy chemicals, testified that the existing adjustment of rates from the Seaboard to the Mississippi River and from the Mississippi River to the Missouri River enter into the development of the business of his firm and of St. Louis, and said: (rec. pp. 312-313.)

"Q. And has been an important factor essential to the development of your business? A. It certainly has. Q. Not only your business but business generally in the city of St. Louis? A. Applicable to all Merchants in St. Louis. Q. And to all business? A. Yes, sir." * * * "A. Any reduction in the through rate from the seaboard territory to Missouri River common points, either class rates or commodity rates would be very disastrous to the commercial interests of this city in my judgment."

The witness was speaking particularly of his "own line of business." He has not much interest in the "first

'wo classes' because the goods handled by his house are carried third and fourth class and by "commodity rates." (rec. pp. 313-16.)

"Some articles in my line of business today, I could mention them if you want them, the car commodity from Mississippi to Missouri River points is 12 cents a hundred." (rec. p. 313.)

It will be noted that the commodity rate on chemicals is 12 cents a hundred between the rivers while the class rates range from 60 cents to 22 cents whereby the Missouri River shippers in dry goods, which go by first class, pay a rate five times as high as that paid by Whitelaw Bros. The business of Whitelaw Bros. approximate half a million dollars per year and covers the area from the eastern boundary of Illinois to the Rocky Mountains and from Minnesota to the Gulf. (rec. p. 314.)

Mr. Whitelaw does not state how much of his firm's business is commission business, nor what percentage of the business moves between the rivers under class rates as distinct from commodity rates, nor what percentage of the merchandise comes from Atlantic Seaboard territory. It is impossible to tell what loss, if any, Whitelaw Bros. would in fact suffer under the rates ordered by the Commission. Such testimony is too vague, uncertain, indefinite and speculative to justify interference by the court with the order made by the Commission.

St. Louis chemical houses have an advantage over like houses in Omaha, St. Joseph and Kansas City on all articles from Pacific Coast terminals in that St. Louis has the same rate for the long haul that the Missouri River Cities have for the shorter haul. (See Ex. 5, rec. pp. 499-501.) The additional freight which Omaha, St. Joseph and Kansas City would pay on the said articles

in order to reach St. Louis or Chicago are set down in Exhibit 6. (rec. pp. 504-505.)

If the theory of the complaining railroads and of Mr. Whitelaw is to be accepted as the correct method of rate making from the Atlantic Seaboard to the Missouri River, to-wit: that the through rate should be made up of the sum of the locals then the rate to St. Louis from Pacific Coast terminals on all of the articles mentioned in Exhibits 5 and 6 should be made up of the rate from the Pacific Coast to the Missouri River plus the rate from the Missouri River to St. Louis.

Thus it appears that Whitelaw Bros. do not make mention of the advantage which they have on articles from the Pacific Coast terminals and seek to retain the advantage which they have on articles from the Atlantic Coast terminals. Taking the business of Whitelaw Bros., or of another drug or chemical house in its entirety, how can the court find that the reduction of the rates ordered by the Commission will unduly or unreasonably discrimnate against them? From all that appears their advantages are greater than their disadvantages.

Charles F. Weller of the Richardson Drug Co., testified he was familiar with commodities handled by drug and chemical houses which come from the Pacific Coast terminals and named the following: Borax and boracic acid, more borax in California than in any other place in the world. Cascara segrada, used largely in manufacturing, comes from the Pacific Coast. Benhac insect powder comes entirely from California. Eucalyptus oil comes from California. Syrup of figs is controlled by a California company. Millions of dollars worth of quick silver from California is used by manufacturing chemists. Forty per cent of the olive oil used in the west

comes from California. California wines are sold all over the United States and exported to Europe. Several carloads are sold every month in the Missouri River towns. The best obtainable mustard is from California. Our house handles from 5 to 10 barrels of California strained honey per year for medicinal purposes. It is also largely handled by grocery houses. More than 100,000 pounds of beeswax comes from California annually. Camphor gum comes by rail from the Pacific coast terminals, also Japanese goods, especially brushes. Crushed fruits, pineapples, etc., take the Pacific coast terminals rates. (rec. pp. 558-561.)

"Q. I want you to state now whether in your opinion that reduction of rates on those five classes will in any wise injure or detrimentally interfere with the business which is conducted by Whitelaw Brothers in St. Louis, and if not you may give your reasons why it will not? A. cannot see that Whitelaw would be interfered with any. I do not think it would injure their business at all. From the very nature of their location they have advantages that we cannot expect to have, and Chicago has advantages too on account of their lake freights, but it certainly could not be expected that Whitelaw and other intermediate houses would control the jobbing trade of the Missouri River. Jobbers have to buy from the same parties that Whitelaw buys from largely. When they sell the retail trade they come in direct competition with the jobber. They are simply jobbers in special lines." (rec. p. 562.)

On cross-examination the witness Weller made the point that a Missouri River house has the same moral right to do business on and east of the Missouri River as Whitelaw Brothers have to do business on or west of the Missouri River. That under the existing adjustment of

rates Whitelaw Brothers have a monopoly of their business on the Mississippi River, and are complaining because they do not have a monopoly of the business on and west of the Missouri River to the exclusion of the Missouri River merchants.

IX.

HARDWARE BUSINESS.

The Rates Ordered By the Commission Will Not Injure or Damage the Hardware Business of St. Louis.

George W. Simmons of Simmons Hardware Company of St. Louis said his Company does business more or less in every country of the world and controls the out put of many factories. (rec. p. 300-1.)

"Q. Now you may state what effect upon commercial conditions here would result from the enforcement of the Commission's order in this case to compel the railroads to transport between the Mississippi and the Missouri Rivers all articles taking class rates at a lower rate when the shipment originates at the Atlantic seaboard than the rate charged generally? A. I believe it would be distinctly detrimental to the business interests of the firm with which I am associated and also others doing business in St. Louis if our competition could land their goods at the Missouri River points at a less rate than we could. Q. You think that would be serious? A. I do. Q. You think it would effect the status and the development of the business in this city? A. I think it would decidedly affect the status. Q. Do you think it would have a deterrent effect upon the development of business here? A. I think it would." (rec. pp. 301-2.)

On cross-examination Mr. Simmons said his house

does business in Central Traffic Association territory at a profit and has certain advantages in rates over the Omaha Jobber at points in the State of Nebraska. (rec. p. 303.)

"You compete with seaboard manufacturers in Central Freight Association territory do you not? A. We do. Q. Are able to do business at a profit? A. Yes." * * * "Q. You know that the rate into St. Louis plus the rate out of St. Louis, for example to points in Nebraska is less than the rate into the Missouri River cities, Omaha for example plus their rate out to those points? A. I believe it is." * * * "Q. Wherever that does exist it gives you an advantage over the Omaha jobber and the other Missouri River jobbers, that is true isn't it? A. Presumably, yes." (rec. pp. 303-4.)

Mr. Simmons does not know and cannot state what percentage or proportion of his business is effected by the order of the Commission, consequently cannot com-

pute the loss, if any.

"Q. Can you give me the amount of your business per year? * * *A. Possibly twenty millions. Q. How much of the twenty millions if you know is affected by this reduction in rates? A. It is impossible to tell you. Q. It is only a small proportion isn't it? A. No, it is a considerable proportion. The majority of our business lies west of the Mississippi River." (rec. p. 305) * * * * "Q. Tell me if you can what reduction in the volume of your business will occur? A. I cannot tell you accurately. Q. You don't know that there will be any whatever? A. I don't know it, nor does any one else. We cannot predict the future. Q. It is mere conjecture isn't it? A. Just as any idea of the future is conjecture." (rec. pp. 305-6.)

It is a matter of common knowledge that heavy hardware comes from the iron and steel mills in the middle west from Pittsburg to Chicago. The freight on heavy hardware from these points to New York and return is prohibitory. There are no hardware jobbing houses in New York that sell goods west of the Mississippi river. As a matter of fact the Simmons Hardware Company have no competition from hardware houses in the seaboard territory.

- Mr. J. A. Warner of Wyeth Hardware Manufacturing Company of St. Joseph, testified, as follows:
 - "Q. You may state from where come the principal commodities handled by hardware houses located on the Missouri river? A. The bulk of it comes from the territory lying between Pittsburg and Chicago, Cleveland and the iron centers. (rec. p. 594.)

About 25% of hardware consists of light or shelf hardware which comes from New England factories. which takes "second class." (rec. p. 594.) The freight rate on shelf goods from New England represents from 5 to 7% of the cost. The reduction in rates, second class is 7¢ per cwt., which represents "a reduction of less than 1/4 of 1%." (rec. p. 594.)

"Q. You may state whether in your opinion such a reduction if enforced would materially interfere in any way with the business of the Simmons Hardware Company carried on in this western country? A. I should not think so. It would be so very small that it would really not effect our selling prices enough to be taken into consideration." (rec. p. 594.)

The Simmons Hardware Company have houses at Wichita, Sioux City and Minneapolis, (rec. p. 595) which will have the same advantages of reduced rates as the houses in Omaha, St. Joseph and Kansas City, and from which that Company can supply its western trade.

"Q. And these branch houses you speak of are used as distributing points are they not for their trade in the northwest and in the middle west and in the southwest? A. Yes." (rec. p. 595.)

Under present rate conditions the Missouri River cities can not do business to a point beyond one hundred miles east from the Missouri river, and Chicago and St. Louis have a monopoly of their surrounding territory.

(rec. p. 595.)

What is the fact as to whether or not, under present freight rate conditions, Chicago and St. Louis do not have a monopoly of the territory surrounding them and the states surrounding the location of the said two named cities? So far as Missouri River houses are concerned that is a fact. Q. Do you know of any moral or good business reason why railroads should so fix railroad rates as to allow these two cities, which enjoy a monopoly in their own territory and in their own surrounding states to have any extended privileges in the territory west of the Missouri River or in your locality? A. I do not know of any Q. In other words you have got the same right to your locality you think that Chicago has to hers or St. Louis has to hers? A. Yes, sir. Q. You may state whether there are any hardware jobbing houses in New York at this time that do any business or any considerable business in this western country? A. No, sir, there are none. Q. Have there been any for a long period of years? A. It has been a good many years. Q. What is the fact as to whether the New York jobbing houses in hardware do any considerable business anywhere west of the city of New York or Pennsylvania or west of the Alleghany mountains? A. I think not. Not to my knowledge." (rec. p. 595.)

Mr. Shann of Masbach Hardware Co., testified

among other things as follows:

We are forced to confine our business to the States of New York, Pennslyvania, Maryland and of course down east, Connecticut, Massachusetts and Maine. We cannot even take the northern part of New York state because the competition there is too great. Q. Then I assume from your statement that you do not do any business in what might be termed the Missouri River zone or territory? A. None whatever. Q. Is that equally true of other hardware jobbing houses in the city. A. So far as I know." * * " "A. From our business experience I cannot see where it will help increase our business. Do you want to know the reasons why? Q. Yes, sir, you may state your reasons why it would not enable you to do business in that territory? A. Of course there are a number of reasons. One is towns having a population of 15,000 or more are able today to support their own jobbers, and dealers prefer to do business with people that they know. Further if they have to go a distance of a hundred miles or more it means a big loss of time in shipping goods. The freight rate is not always considered." (rec. p. 634.)

To the point that the reduction of rates ordered by the Commission would not enable New York hardware houses to extend their business to the Missouri River Mr. Shann said:

"Q. I call your attention to another fact, that Mr. Simmons testified in effect that if this reduced rate that I have heretofore mentioned should go into effect it would have a deterrent effect upon the development of the business of the Simmons Hardware Company of St. Louis and west thereof?" ** * "A. In my opinion I cannot see where it can be detrimental to them in any way. Q. Then if I understand you correctly this reduction in the freight rates that I have spoken of would not be sufficient to enable a hardware house in this city such as your own,

to do any business west of the Missouri river?

A. That is our experience." (rec. p. 635.)

On cross-examination the witness testified:

"Q. Has your house ever done any business out west except seven or eight years ago on the occasion when as you stated you endeavored to work up a western business? A. No further west than New York state and Pennsylvania. Q. You do not sell as far west as Cleveland and Toledo? A. No, sir. Q. Nothing at all in Chicago or St. Louis or the Missouri river points? A. No, not outside of seven years ago." (rec. p. 636.)

To the point that the western houses have the advantage of nearness to the point of distribution Mr. Shann testified:

"Q. That advantage that they have in regard to the nearness to their customers is of course a natural advantage is it not? A. A decided advantage. Q. But a natural one? A. It would be a natural one. Q. It does not flow from any artificial or any arbitrary state of circumstances? A. It is a natural one. Q. It comes from nearness to market? A. Yes, sir." (rec. p. 637.)

The witness testified on re-direct examination that heavy hardware is manufactured at Pittsburg and Cleveland, and the freight rate in and out from New York is prohibitory on the business and that St. Louis has an advantage.

"Q. Is it not true that at the present time large quantities of hardware, particularly what might be known as heavy hardware are manufactured in the west, say at Pittsburg and Cleveland where the iron mills are? A. There is, including Pennsylvania. Q. If a New York house should handle the hardware manufactured in that country who would pay the freight

in here, who would be burdened with that additional freight rate? A. He pays it indirectly. Q. Then a St. Louis house would have an advantage over you as to such goods by reason of the place of manufacture and production being that much nearer St. Louis, you having to pay the cost of the freight on those goods into New York and then to reship them to St. Louis even if you could do so at all? A. They would have that advantage." (rec. p. 641.)

Comment. (a) The testimony of Mr. Warner and Mr. Shann to the point that there are no New York hardware jobbing houses that do business in the west in competition with Chicago or St. Louis is not denied in the record. From their testimony it affirmatively appears that New York houses do not sell goods west of the Alleghany Mountains.

- (b) Mr. Simmons had testified that his house controls the out-put of several factories of shelf goods, so the house cannot be in danger of competition in that line.
- (c) The St. Louis house has an advantage in freight rates on all heavy hardware which gives them a monopoly over eastern houses in that line of goods.
- (d) If the freight rates were reduced there is no evidence that any New York jobbing hardware house could afford to do business west of the Alleghany Mountains.

Under these facts stated supra, and not denied by Mr. Simmons it does not appear that the reduction in rates would either injure the business or damage the profits of the Simmons Hardware Company or of any other St. Louis house.

FIBRE CANS.

The Rates Ordered by the Commission Will Not Unduly or Unreasonably Prejudice or Injure the Business of Detroit.

Henry Kirk White, Jr., of the Kemmiweld Can Co., was the only witness from Detroit. He expressed the opinion that the existing relation of rates from the Atlantic Seaboard and from Detroit to the Missouri River is a factor in his business and that the new rates as ordered by the Commission will "be a positive loss of business" to his company. He further stated: (rec. p. 238.)

"Q. What you have said with reference to your particular line of business you may state whether that is in general true of business in Central Freight Association territory? A. Practically the same thing. Q. Take a full car load of your product moving between the Mississippi River and the Missouri River, what would be the amount of the reduction in favor of the Atlantic seaboard shipper of the gross charge for that haul?" " " "A. Five dollars."

Mr. White further testified that the raw material, jute and sulphide fibre made of wood, principally comes from the East, from Poukhkeepsie and the northern part of New York state. The witness does not know what it costs to get the raw material and does not know the rate on the finished product from Detroit to the Rivers. He admits that on the finished product the Kemmiweld Can Co. has a start of several hundred miles over its eastern competitors, but insists that his competitors pay a less rate on the raw material, but how much is not stated. (rec. pp. 238-241.) The witness admits that his company has enjoyed, under the existing rate, an advantage of 42 cents first class L. C. L. and 28 cents or 29 cents on car-

load business and is some 700 miles nearer the western market. (rec. p. 248.) The reduction of 5 cents per cwt. would mean a loss of \$1,500.00 on 30,000,000 cans delivered at the Missouri River.

The testimony of the witness when condensed means simply this, to-wit:

That the company has an advantage over its eastern competitor on the freight rate on the finished product to the Missouri River of 28 cents per hundred pounds. The reduction of 5 cents per hundred pounds by order of the Commission will still leave the Kemmiweld Can Company an advantage over its eastern competitors to the Mississippi River on the finished product of 23 cents per hundred pounds.

If 5 cents per hundred pounds on 30,000,000 cans to Missouri River means a loss of \$1,500.00; 23 cents per hundred advantage which Detroit has over eastern competitors by being 700 miles nearer the Missouri River means \$8,400,00 in favor of Kemmiweld Can Company.

Mr. McVann, from a personal investigation and from an examination of the tariff sheets, testified that the rates on fibre cans from Plattsburg and from Willisborough to Philadelphia is 17 cents. From Ausable Forks, N. Y., to Detroit, 19 cents. Said rates are indicative of the rate basis on the raw material to New York, Philadelphia and Detroit, with the result that Detroit would pay 19 cents per hundred pounds on raw material and New York and Philadelphia 17 cents on the raw material. The rate on the manufactured product from New York to the Missouri River is 76 cents, raw material 17 cents, total freight cost 93 cents. (rec. pp. 520-521.) The Detroit man, 19 cents on raw material and 56 cents to the Missouri River on the finished product, or a total freight cost of 75 cents. This

leaves the Detroit man an advantage over New York competitor of 18 cents per hundred pounds and of 16 cents as against Philadelphia. If the order of the Commission went into effect the Detroit man would still have an advantage over New York of 13 cents per hundred pounds, over Philadelphia of 11 cents. (rec. p. 522.)

Mr. McVann prepared a table showing the rates on the raw material to New York and to Detroit, and the rate on the finished product from New York or Detroit to Omaha, from which it appears that the Kemmiweld Can Company of Detroit has a gross advantage of 18 cents over New York, and will have an advantage of 13 cents over New York should the order of the Commission go into effect. (rec. p. 524.)

Albert D. Morstadt, of the Union Paper Company of New York city, testified that his company had been engaged in the manufacture of fibre cans since 1876; that the fibre came from Ohio, Michigan, Pennsylvania, New York and Massachusetts, and there are mills near the factory of the Kemmiweld Can Company of Detroit. (rec. p. 630.)

The rate on fibre material from Ohio and western New York to New York city is 17 cents per hundred pounds, and that the rate from Poughkeepsie to Detroit is 12 cents per cwt. (rec. p. 630.)

The witness to demonstrate that under existing rates the Kemmiweld Can Company of Detroit has an advantage over New York on Missouri River business, of 23 cents per cwt., and after the order of the Commission will go into effect will still have an advantage of 11 cents per cwt., testified: (rec. pp. 631, 632.)

"A. If I may answer that question in my own way
I would take as an illustration the shipping of

cans from New York to Omaha. We would get into a car, an ordinary freight car, 45,000 cans about. I am quoted a freight rate 14,000 pounds minimum, to the Mississippi river at 41 cents per hundred from the Mississippi River to Omaha 10,000 pounds minimum weight cents per hundred making the total cost to us of getting a car from New York to Omaha \$102.40, or at the rate of \$2.27 per thousand cans. Taking the same car and applying the rate which I am advised is in effect between Detroit and Omaha of 651/2 cents per hundred weight, 14,000 pounds minimum, 45,000 cans to the car amounts to \$91.70, which would make the cost to the Detroit manufacturer of transporting one thousand cans from Detroit to Omaha \$2.04 against our \$2.27." * * * "Q. The advantage now in favor of Detroit on one thousand cans is how much? Twenty-three cents." * * " "A. If the rate were reduced four cents per hundred pounds taking 14,000 pounds of minimum weight in a car it would reduce the cost of his cans 12 cents per thousand. Q. He would still have an advantage over you of how much? A. Eleven cents. Q. So then it turns out instead of the Detroit man being ruined if the change should go in he would still have an advantage over you of eleven cents? A. It would appear that way. Q. Without the reduction he has got an advantage over you of some 27 cents. A. Twentythree cents."

Comment. From the admission made by Mr. Henry Kirk White on his cross-examination the Kemmiweld Can Company, on 30,000,000 cans sold to the Missouri River, had an advantage of \$8,400.00 over his New York competitor. According to the testimony of Mr. McVann the Kemmiweld Can Company has an advantage over his New York competitor of 18 cents per hundred pounds and according to the testimony of Mr. Morstadt, the Kemmiweld Can Company has an advantage over New

York of 23 cents per 1,000 cans and will have an advantage of 11 cents per 1,000 cans after the reduction in rates between the rivers.

The foregoing chapters, III to X, inclusive, contain what we believe to be a fair summary of the evidence, pro and con, bearing upon the question whether the reduced rates ordered by the Commission will operate to unduly or unjustly discriminate against any of the cities in the Central Traffic Association territory. We believe we are justified in the statement that the evidence preponderates to the point that the cities in the Central Traffic Association territory do now have, and will continue to have an advantage over the Missouri River cities, Omaha, St. Joseph and Kansas City, when the rates ordered by the Commission shall have gone into effect.

XI.

Cities in the Central Traffic Association Territory Are Not as a Matter of Legal Right Entitled to the Benefit of the -Reduction in Rates Ordered by the Commission Between the Mississippi and the Missouri Rivers.

The inquiry between the shippers of the different localities must be narrowed to the simple question whether the reduction in rates on the through business from the Atlantic Seaboard to the Missouri River unduly or unjustly discriminates against intermediate cities from Buffalo to Chicago or St. Louis. We have endeavored to establish by the preceding chapters that as a matter of fact each of the persons or companies complaining

have had, and still have an advantage over shippers from the Seaboard to the Missouri River cities. Independent of the question whether said persons do or do not have an advantage it does not follow that the rates ordered by the Commission are unreasonable or unjust nor that the intermediate cities are entitled to the benefits of said rates.

In Interstate Commerce Com. v. Louisville & Nashville R. R. Co., 190 U. S. 273, this court held that the people of LaGrange were not entitled to the benefit of the same rate from New Orleans granted the people at Allanta. In East Tennessee, Etc., R. R. vs. Interstate Com. Com., 181 U. S., 1., this court held that Chattanooga was not entitled to the benefit of the same rate given to the cities of Nashville and Memphis on shipments from the Atlantic Seaboard. In Interstate Com. Com. vs. Alabama Midland R. R., 168 U. S. 144, it was held that Troy, Alabama, was not entitled to the same rate from New York as the town of Montgomery. In Interstate Com. Com. vs. Nashville, Etc., R. R. Co., 120 Fed., 934, it was held that Palatka, Fla., was not entitled to the same rate from St. Louis given to the town of Hampton, Fla. In Interstate Com. Com. vs. Baltimore & O. R. R., 145 U. S. 263, it was held that individuals were not entitled to enjoy the same rate as granted to a number of persons who purchased what was termed party rate tickets. In Gamble-Robinson Com. Co. vs. C. & N. W. R. R., 168 Fed., 161, is found a review of a large number of other cases in which it was held that persons or localities were not entitled as a constitutional right to have granted to them the same privileges or the same rates which may have been granted to others, or put in other words, the courts ruled that the railroads were not required to grant the same privileges and the same rates to all shippers or to all persons, or to all localities, but were required to do so, only when the refusal to do so would amount to an unjust or an unreasonable discrimination or to the giving of an unjust or an unreasonable preference.

The record in the present case is full of similar illustrations, as follows: The local rate from Chicago to St. Paul and Minneapolis is 60 cents 1st class; on Atlantic Seaboard business the rate from Chicago to the Twin Cities is 40 cents 1st class. The rates from Chicago to Omaha vary according to the initial point of shipment and point of consignment, as follows: Local rate 80 cents 1st class. When the initial point is Atlantic Seaboard territory the rate is 74.7 cents 1st class. If the point of consignment is Oklahoma common points the rate is 48 cents 1st class. If the point of consignment is Texas common points the rate is 47.1 cents 1st class. If the point of consignment is Washington and Spokane common points the rate is 40 cents 1st class. If the point of consignment is Pacific Coast terminals the rate is 33 cents 1st class. The railroad companies, under existing structure of rates, have established these different rates for the transportation of merchandise between Chicago and Omaha, the variation arising from the point of shipment or the point of destination.

Which of these different rates is so sacred that it shall not be disturbed? Which of these rates, if any, have either the railroad companies or the shippers a constitutional right to maintain? If it is equality of rates that is sought for by the railroad companies then all these rates should be the same between Chicago and Omaha. If the railroad companies have a right to justify these different rates by reason of different conditions,

or different points of shipment to different points of destination, has not the Interstate Commerce Commission an equal right to inquire into the question whether any of said rates are too high? That was all that was done by the Commission. The Commission found that the rates on goods from the Seaboard consigned to Omaha, St. Joseph and Kansas City were too high and reduced them. It did nothing more. If other shippers from other points of consignment have occasion to complain let them go before the Commission and file their complaint and they will be heard.

What constitutes discrimination is a question of fact. Interstate Commerce Commission vs. Southern Pacific Co., 123 Fed., 597-601. Texas & Pacific Ry. Co. vs. Interstate Com Com., 162 U. S., 197-219-220. Interstate Com. Com. vs. Alabama Midland R. R., 168 U. S., 144-170.

In East Tennessee, Virginia & Georgia R. R. Co. vs. Interstate Commerce Commission, 181 U. S., 1, this court went to the extent of ruling that it would not undertake to exercise its original judgment on the facts and that whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission.

Undue or unreasonable discrimination. What is it? Mere difference in rates is not necessarily so. Difference in rates for long and shorter haul, or in through rates versus local rates is not necessarily so. Interstate Com. Com. v. Louisville & Nashville Ry. Co., 190 U. S., 273. East Tennessee, Etc., Ry. Co. v. Interstate Com. Com., 181 U. S., 1. Texas Pac. Ry. Co. v. Interstate Com. Com., 162 U. S., 197. Interstate Com. Com. v. Alabama Mid-

land Ry. Co., 168 U. S., 144. Interstate Com. Com. v. Nashville, etc., Ry. Co., 120 Fed., 934.

In Interstate Com. Com. v. Baltimore & Ohio Ry. Co., 145 U. S., 263, it is said: "It is not all discriminations or preferences that fall within the meaning of the statute; only such as are unjust or unreasonable."

In Texas Pac. Ry. Co. v. Interstate Com. Com., 162 U. S. 197 (the import rate case), this court said (pp. 219-20.)

"The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act." * * * "The mere circumstances that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act." * * * "The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question."

CONCLUSION.

If it be the claim of the railroads that the order of the commission is void because it requires the transportation of Seaboard business between Chicago and the Missouri River cities at a less rate than the local rate charged on Chicago shipments; we answer that the railroad companies in their rate structures have made a differential in rates, dependent upon the point of shipment and upon the point of destination, and varying from 80 cents local rate, to 33 cents Pacific Coast terminals rate; (from Chicago to Mo. Riv.)

If it be the claim of the railroads that the order of the Commission is void because the rate ordered by the Commission is not made up of the sums of the locals, we ask the query, of what locals? The local from New York to Chicago is 75 cents. The local from Chicago to the Missouri River is 80 cents. The railroads have never made the sum of the two said locals the basis of the through rate from the Seaboard to the Missouri River.

If the railroads mean that the order is void because the through rate does not remain the same as the sum of existing proportionals on the through business (New York to Chicago 72.3, Chicago to Omaha 74.7), we ask why may not the proportional from New York to Chicago or from Chicago to the Missouri River be changed if either one be found to be too high?

Chicago is made the basing point if the merchandise go to Minneapolis or St. Paul. The same companies, on through business from the Atlantic Seaboard to Omaha, St. Joseph and Kansas City, make the Mississippi River the division or basing point. These basing points are artificial creations for convenience. The proportional of rates from the Atlantic Seaboard to Mississippi River

basing point is 87 cents, Mississippi to Missouri River is 60 cents. If the railroads insist that the sums of the locals are 87 cents and 60 cents, we ask why do not the railroad companies have the same apply to shipments to Texas and Oklahoma and Washington and Spokane and the Pacific Coast Terminals?

It appears from the table of Mr. Mahoney, heretofore referred to in the record that the so-called sum of
the artificial locals from the Atlantic Seaboard to the
Mississippi River and from the Mississippi River to the
Missouri River only apply to less than 5 per cent of the
tonnage between the rivers. In other words, the said
rate between the rivers on business coming from the Seaboard, and destined to the Missouri River is an artificial
rate created for that particular business and which does
not have application to the general business of the
companies.

The Commission created a new proportional rate on this business between the rivers, which may as well and as truthfully be called a local rate between the rivers as the existing proportion of 60 cents between the rivers.

If the existing rate of \$1.47 is to be called the sum of two locals, to-wit: 87 cents and 60 cents, then the new rate created by the Commission can as truthfully be said to be the sum of two locals, 87 cents and 51 cents.

If it be the claim of the railroads that the order is void on the theory that it ignores the Mississippi as a basing point, we answer that is not the effect of the order of the Commission. The rate from New York to the Mississippii River as a basing point remains the same. It only creates a new rate from the Mississippi, a basing point, to the Missouri River, another basing point.

If it be the claim of the railroads that the order is

void because the Central Traffic Association territory does not get the benefit of the new rate between the rivers, we answer that all the cities in the Central Traffic Association territory east of Chicago and St. Louis have never had the benefit of the through rate from the Seaboard to Chicago or St. Louis. All rates from all initial points to all points of destination have been created to meet the different conditions. When the railroads have found the rates too low they have raised them; when they have believed them too high they have lowered them.

The Interstate Commerce Commission has the power to reduce these rates when found to be too high. Congress has the constitutional right to confer this power upon the Commission. The Commission has exercised the power in the present instance. Neither the railroads nor the shippers have a constitutional right to the perpetuation of any rate, for if so, all rates when once fixed would remain perpetually, and would not be subject to change. No railroad company in the United States recognizes any such principle in rate making.

Confessedly, Congress has the constitutional right to confer upon the Interstate Commerce Commission the power to reduce any of these rates when found too high. That is what and all that the Commission did in the case at bar. It is not for the railroad companies to complain of it on a mere whim or fancy, nor because in their judgment the order should have been differently phrased.

JOHN LEE WEBSTER, Solicitor for BURNHAM, HANNA, MUNGER DRY GOODS CO., ET AL., Appellants. JOHN H. ATWOOD.

Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

Interstate Commerce Commission, appellant,

v.
Chicago, Rock Island & Pacific Railway Company et al., appellees.

The Burnham, Hanna, Munger Dry Goods Company et al., appellants,

v.
Chicago, Rock Island & Pacific Railway Company et al., appellees.

No. 664.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the Interstate Commerce Commission, moves the court to advance this cause for hearing during the present term, for the following reasons:

1. The cause is a proceeding in equity under section 16 of the act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, brought by the Chicago, Rock Island & 10796-09

Pacific Railway Company and others, in the circuit court of the United States, to enjoin the enforcement of an order of the Commission against the complainants, made under and by virtue of the provisions of said act.

2. On June 24, 1908, the Interstate Commerce Commission, after hearing before it upon complaint, made an order reducing the rate to be charged by the Chicago, Rock Island & Pacific Railway Company; the Chicago, Burlington & Quincy Railroad Company; the Chicago, Milwaukee & St. Paul Railway Company; the Chicago & Northwestern Railway Company, and the Chicago & Great Western Railway Company for the transportation of articles of the first class, originating at Atlantic seaboard points, from Mississippi River crossings to the Missouri River cities from 60 cents per 100 pounds to 51 cents per 100 pounds. and making a similar reduction upon articles of the second, third, fourth, and fifth classes originating at the same points and carried to the same destina-The Commission prescribed as the effective date of the order August 25, 1908, which was later extended by the Commission to November 10, 1908. On October 17, 1908, the above-named railroad companies filed their bill of complaint against the Interstate Commerce Commission, and praved the court to enjoin the enforcement of said order. Thereafter, by leave of court, the Illinois Central Railroad Company and five other railroad companies operating between the Mississippi and Missouri

rivers filed their intervening petition to be made co-complainants. Still later, by leave of court, Burnham, Hanna, Munger Dry Goods Company, and other shippers and jobbers at Missouri River cities filed their intervening petition to be made parties co-defendant; and then, by leave of court, A. J. Lindemann and Hoveison Company, of Milwaukee, Wis., and various other shippers, jobbers, and manufacturers at Chicago, St. Louis, Detroit, and Cleveland, filed their intervening petition to be made co-complainants. A preliminary injunction was issued by the circuit court, restraining the enforcement of the said order of the Commission until the final hearing of the cause. The case came on for final hearing before Judges Grosscup, Baker, and Kohlsaat. A majority of the court, Judge Baker dissenting, entered a final decree annulling the order of the Commission on the ground that the Commission was without power to make the order. The case comes to this court on the appeal of the Interstate Commerce Commission and of the intervening co-defendant shippers (being the complainants before the Commission). The case involves the power of the Commission, as well as the power of the courts to review and supervise the action of the Commission, in prescribing rates for the future.

3. The speedy determination of the lawfulness of the Commission's order prescribing rates for the future and of the extent to which the judicial power can supervise the action of the Commission is a matter of great public importance.

4. The act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, in section 16, makes the provisions of "An act to expedite the hearing and determination of suits in equity," etc., approved February 11, 1903, applicable to all such suits, and said section provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

Owing to the size of the transcript of record, it is respectfully suggested that the case be assigned for hearing not earlier than some time after the reconvening of the court after the holiday recess.

I am authorized to state that counsel for all parties concur in this motion.

LLOYD W. BOWERS, Solicitor-General.

NOVEMBER, 1909.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

The Interstate Commerce Commission v.

CHICAGO, ROCK ISLAND AND PACIFIC Railway Company et al.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This case comes here upon appeal from the Circuit Court for the Northern District of Illinois.

The suit was brought by the railroad companies in the circuit court to restrain the enforcement of an order of the Interstate Commerce Commission which reduced class rates theretofore existing for the transportation of property between Mississippi River crossings and Missouri River cities as parts of the through class rates on through shipments originating at Atlantic seaboard points and destined to the Missouri River cities.

34322-10-1

The Attorney-General filed his certificate under the Expediting Act (32 Stat., 823) and the case came on for hearing before Judges Grosscup, Seaman, and Baker, who issued a preliminary injunction in accordance with the petition of the railroads. Reference was made to a special examiner upon the question of whether or not the Commission's order resulted in uniust discrimination upon certain intermediate localities and shippers. Thereafter voluminous testimony was taken on behalf of the railroads and intervening shippers, the Commission offering no evidence The final hearing was had before Judges whatever. Grosscup, Kohlsaat, and Baker, and a permanent injunction against the Commission's order was granted by the first-named two judges, Judge Baker dissenting. From that decree the Commission appeals to this court.

ACT OF THE COMMISSION.

In order to understand the issues involved in this appeal, it is necessary to set out in detail the facts and the various steps in the litigation.

On February 11, 1907, Burnham, Hanna, Munger Dry Goods Company, and a large number of individuals, partnerships, and corporations, as shippers, jobbers, and wholesalers at Kansas City, St. Joseph, and Omaha, filed their complaint before the Commission, alleging that rates charged by carriers operating between points on the Atlantic seaboard and Missouri River cities upon traffic originating at the seaboard and destined to said cities were unjust, unreasonable, and discriminatory (Rec., p. 14). At that time the

rates on the various classes per hundred pounds on such shipments were as follows:

These rates were made up by taking the joint through rate to the Mississippi River crossings (which was computed on a basis of 116 per cent of the Chicago rate) plus a local charge from such Mississippi River crossings to said Missouri River cities. The joint through rates to said Mississippi River crossings applying to Atlantic seaboard shipments destined to Missouri River cities were in cents per 100 pounds:

To which joint through rates to said Mississippi River crossings were added local rates upon the first five classes, as follows:

The complaint specifically attacks the reasonableness of the through rates so arrived at and also the reasonableness of the rates between the rivers so far as the same were applied to Atlantic seaboard shipments. The carriers operating between Chicago and the Missouri River cities received out of the joint through rate up to the Mississippi River on seaboard shipments on the first five classes the following in cents per 100 pounds:

$$\frac{1}{14.7} \quad \frac{2}{12.6} \quad \frac{3}{9.6} \quad \frac{4}{6.7} \quad \frac{5}{5.6}$$

Making the total amount received by carriers operating through from Chicago to Missouri River cities on the first five classes, in cents per hundred pounds, the following:

Prayer was made to the Commission for an order commanding the carriers to desist from charging, accepting, and retaining the through rates of \$1.47 on the first class and the other rates charged on the remaining four classes; from charging, accepting, and retaining for their share of the through business for the movement from Chicago to Missouri River cities their proportion of 74.7 on first class and a proportionate amount on the other four classes and to establish in lieu thereof the following joint through rates from the seaboard to the Missouri River cities:

Complaint was originally directed against the Chicago, Rock Island & Pacific Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Northwestern Railway Company; and Chicago & Great Western Railway Company. Upon the application of the Chicago & Northwestern Railway Company certain carriers operating east of Chicago were made defendants. The various carriers made defendant filed answers with the Commission denying that the rates complained of were unjust,

unreasonable, or unjustly discriminatory or unduly preferential.

The Chicago, Burlington & Quincy Railroad Company in its answer stated that if the per ton per mile rates on traffic other than that embraced within the complaint were less than the per ton per mile rates charged the complainants, it was "fully justified in so doing on the principle well recognized by this honorable Commission that the longer the haul under similar circumstances and conditions the less should be the rate per ton per mile." It was further alleged by said defendant that the lower rates upon such other traffic were controlled and fixed by water competition, and that "this defendant, in order to participate in traffic to Pacific coast points, which traffic is of great volume, importance, and value, and upon which traffic this defendant is enabled to make some profit, has been obliged to make said per ton per mile rates to said Pacific coast points less than the per ton per mile rates enjoyed by these complainants." (Rec., p. 990.)

The testimony and arguments before the Commission were directed against the rates charged west of Chicago and the Mississippi crossings. The Sioux City Commercial Club intervened and supported the complainants' request, emphasizing, however, the view that whatever might be done for Kansas City, St. Joseph, and Omaha should likewise be done for Sioux City, as it was a Missouri River city. The St. Paul Jobbers and Manufacturers' Association and the Minneapolis Commercial Club intervened and in substance supported the position taken by the

defendant carriers. The Chicago Association of Commerce and the St. Louis Merchants' Traffic Bureau and Business Men's League appeared at the hearing on behalf of the commercial interests of their respective cities, offered evidence, were heard on brief and in oral argument in defense of the system of rate construction based upon Mississippi River crossings, and in opposition to any rate adjustment that would give the Missouri River cities an advantage at the expense of Chicago and St. Louis.

The evidence taken before the Interstate Commerce Commission will be found in the record (pp. 721-1042).

The Commission in accordance with the provisions of the statute made its order June 24, 1908, and at the same time filed its report and opinion attached as an exhibit to the bill of complaint herein. (Rec., p. 21.)

Some of the material findings of the Commission are as follows:

Complaint alleges unreasonableness of the class rates from the Atlantic seaboard, and the defendants named in the complaint were the Chicago, Rock Island & Pacific Railway Company, the Chicago, Burlington & Quincy Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Chicago & Northwestern Railway Company, and the Chicago Great Western Railway Company. All of these are carriers whose lines do not extend east of Chicago, and all of them have lines from Chicago, through the several Mis-

sissippi River crossings, to the Missouri River cities. The defendants whose lines are east of Chicago were made defendants upon application of the Chicago & Northwestern Railway Company. It will, however, be seen that the complaint, testimony, and the argument are all against the rates charged west of Chicago and the Mississippi River crossings. (Rec., p. 22.)

Complainants alleged that the class rates from the Atlantic seaboard, of which New York will be taken as representative, to the Missouri River cities, to wit (in cents per 100 pounds):

$$\frac{1}{147} \quad \frac{2}{120} \quad \frac{3}{93} \quad \frac{4}{68} \quad \frac{5}{57}$$

are unjust and unreasonable; that they are unjustly discriminatory against the Missouri River cities as compared with the class rates from New York to the Twin Cities, to wit (in cents per 100 pounds):

and they ask that the Commission establish from New York to the Missouri River cities the following through class rates (in cents per 100 pounds):

together with proportionate reductions from eastern producing points as shown in Western Trunk Line Tariff No. 786, I. C. C. 678, or such other rates as may be found just and reasonable. Defendants Chicago, Rock Island & Pacific Railway; Chicago, Burlington & Quincy Railway; Chicago, Milwaukee & St. Paul Railway; Chicago & Northwestern Railway; and Chicago Great Western Railway, are parties to the tariff so referred to. It contains rates on classes and commodities from "Atlantic seaboard and points west thereof, east of the western termini of the trunk lines," to St. Paul, Minneapolis, etc., and the term "Atlantic seaboard" is used herein in that sense.

Defendants admit the correctness of the rates stated in the complaint, and the divisions thereof between the several carriers, and the distances via the various routes, but they deny that such rates are unjust and unreasonable. or unjustly discriminatory in comparison with the rates to the Twin Cities. Of the five original defendants, the Rock Island, the Northwestern, and the Great Western allege justification for the lower rates to the Twin Cities on the ground of competition by water as well as of competition via the Canadian Pacific and the Minneapolis, St. Paul & Sault Ste. Marie Railway, hereinafter referred to as the Soo line. (Rec., p. 23.)

As has been noted, the Missouri River cities have a certain territory naturally tributary to them in which the Twin Cities are apparently unable to compete with them, but in certain other territory naturally tributary to the Twin Cities the Twin Cities jobbers have an advantage over the Missouri River cities jobbers, and this must necessarily be so as to all distributing centers if the cost of the service and the dis-

tance which goods are transported are to be given any consideration in determining transportation rates. It is not possible to place all commercial centers on an equality in the cost of transportation except by basing transportation charges upon the same principle that underlies the Government's charges for the transmission of mail matter.

It is therefore proper for us to here look into the question of not only what the rates are, but upon what principles they are constructed, by what conditions they are controlled, and what would be the effect of important changes Chicago is 912 miles and St. Louis is 1.063 miles from New York, Kansas City is 280 miles northwest of St. Louis, St. Joseph is about 65 miles northwest of Kansas City, and Omaha is approximately 200 miles northwest of Kansas City. The short-line mileages from New York to the Missouri River cities are via St. Louis to Kansas City, 1,342 miles; to St. Joseph, 1,390 miles; to Omaha, 1,477 miles, and via Chicago to Kansas City, 1,370 miles; to St. Joseph, 1,382 miles; and to Omaha, 1,405 miles. The short-line mileage from Chicago to Kansas City is 458 miles, to St. Joseph 470 miles, and to Omaha 492 The short-line mileage from Chicago miles. to Minneapolis is 420 miles and to St. Paul 409 The average distances, however, between Chicago and the Missouri River cities and between Chicago and the Twin Cities are approximately the same.

For a long time the rates from New York to points east of Chicago and to points between Chicago and the Mississippi River have been established on a percentage basis, the New York-Chicago rate being taken as 100 per cent. The rates from New York to points east of Chicago are fixed at certain percentages below the New York-Chicago rates, and from New York to points beyond Chicago up to the Mississippi River crossings at certain percentages above the New York-Chicago rates.

Rates from New York to the Mississippi River crossings were fixed by the establishment of the New York-East St. Louis rate. at 116 per cent of the New York-Chicago rate, and it will be seen that the mileage from New York to East St. Louis is substantially 116 per cent of the mileage from New York to Chicago. On January 1, 1908, the bridge tolls between East St. Louis and St. Louis were taken into the through rates, and St. Louis, Mo., and East St. Louis, Ill., were placed upon the basis of 117 per cent of the New York-Chicago rates, which resulted in increasing the class rates 1 cent in each of the first three classes. The rates and divisions quoted herein, however, are those in effect at the time of the hearing of this case.

East St. Louis being a Mississippi River crossing and the rates having been established at 116 per cent of the New York-Chicago rates, the rates from New York to all of the other Mississippi River crossings to and including East Dubuque, Ill., were fixed the same as to East St. Louis on traffic moving through them and to points beyond. This resulted in establishing class rate from New York to the several

Mississippi River crossings, in cents per 100 pounds, as follows:

The local class rates under Western Classification applying from the several Mississippi River crossings on traffic moving through them from New York and destined to the Missouri River cities were, in cents per 100 pounds:

It will, therefore, be seen that the through class rates from New York to the Missouri River cities made by combination of the class rates to the Mississippi River crossings applicable on business beyond and the class rates from the Mississippi River crossings to the Missouri River cities resulted in class rates, in cents per 100 pounds, as follows:

It should be understood that these rates apply on traffic moving via Chicago and that much of the traffic moving through the upper Mississippi River crossings moves via Chicago, and it should be remembered that the rates west of the Mississippi River crossings are not constructed upon percentages of the New York-Chicago rates, or upon any other percentage basis. They are the independently established class rates applying between the Mississippi River crossings and the Missouri River crossings, and are made without reference to any methods employed in fixing the rates from

the Atlantic seaboard to the Mississippi River crossings.

The local class rates from Chicago to the several Mississippi River crossings are on scales which range from 35.3 to 43.3 cents first class, and it will therefore be seen that the proportional rate from New York to the Mississippi River crossings applicable on business going west of the Mississippi is considerably less than the full combination of class rates on Chicago. The proportionals from New York to the Mississippi River crossings through Chicago are divided as follows:

Lines east of Chicago:

Lines west of Chicago:

In addition to the above division of the proportional rate up to the Mississippi River crossings, the lines west of Chicago on business destined to the Missouri River cities get their full class rate local, giving them as earnings on this traffic for their service between Chicago and the Missouri River cities the following, in cents per 100 pounds:

$$\frac{1}{74.7}$$
 $\frac{2}{57.6}$ $\frac{3}{44.6}$ $\frac{4}{33.7}$ $\frac{5}{27.6}$

The through class rates from New York to the Twin Cities, in cents per 100 pounds, are divided as follows:

To the lines east of Chicago:

| 1 | 2 | 3 | 4 | 5 |
|----|----|----|----|----|
| 75 | 65 | 50 | 35 | 30 |

To the lines west of Chicago:

And it is thus seen that in this division the lines east of Chicago get their full New York-Chicago rates. The division going to the lines west of Chicago constitute a line of proportional rates applicable only upon through business, the local class rates between Chicago and the Twin Cities being established on a scale of 60 cents first class.

Complainants allege that the operating and transportation conditions between Chicago and the Missouri River cities and between Chicago and the Twin Cities are not substantially different and in no sense justify the existing differences in rates.

As has been seen, the defendants allege the controlling influence of competition by water and via the Soo Line in the fixing of the Chicago-Twin Cities proportionals. Complainant argues that this claim is not possessed of any merit, and in support of that argument cites the fact that these Chicago-Twin Cities rates have been increased during the season of lake navigation and reduced at a time when navigation was closed. There is much conflict in the testimony as to the effect of the competition of the Soo Line and as to when that became a factor in the situation. Complainants went to great trouble to locate the facts. but a careful inquiry into the records of the Commission show that in some respects complainants' witnesses were mistaken on this point. (Rec., pp. 25, 26, 27.)

The controlling influence of the water and Canadian competition over the rates from the seaboard to the Twin Cities is apparent, and it is also apparent that the defendant carriers west of Chicago must meet the force of that competition or refrain from participation in that business. Their local class rates from Chicago to the Twin Cities are on the basis of 60 cents first class, as compared with a 55-cent scale via lake and rail from Chicago to the Twin Cities via Gladstone and the Soo Line, and a 50-cent scale from Chicago to the Twin Cities via Duluth.

The joint through class rates from New York to the Twin Cities apply up to the Missouri River crossings on traffic from the Atlantic seaboard destined through them to the Montana common points and to Spokane, Wash., and common points as well as upon traffic through the Twin Cities to the same destinations. The locals from the Missouri River crossings and from the Twin Cities are added thereto to make up the combination through rates. The local class rates from the Twin Cities to Montana common points, and to Spokane, Wash., and common points, are the same as from the Missouri River crossings to the same destinations. This adjustment is forced by competition. If the lines via the Missouri River crossings did not make the same rates to Montana and Washington points that are available via the Twin Cities they could get none of that business.

The class rates from Chicago to Oklahoma City, moving via Kansas City, are on a scale of \$1.50 per 100 pounds first class, of which the carriers between Chicago and Kansas City receive as their division 48 cents.

The class rates from Chicago to Texas common points applying via Kansas City are on a scale of \$1.57 per 100 pounds first class, of which the carriers between Chicago and Kansas City receive 47.1 cents. The class rates from Chicago, through Kansas City, to El Paso, Tex., are on the scale of \$1.69 per 100 pounds first class, of which the carriers between Chicago and Kansas City receive as their division 47.1 cents. The distance from New York to the Missouri River cities is substantially the same as from Chicago to El Paso.

On transcontinental traffic from the Atlantic seaboard to the Pacific coast terminals carriers west of Chicago receive as their division of the class rates for the haul between Chicago and the Missouri River crossings on the first five classes, in cents per 100 pounds, the following:

From these divisions of through rates accepted by the carriers between Chicago and the Missouri River crossings and from the admission of the Chicago, Burlington & Quincy Railway Company in its answer that they give said carriers some profit, complainants argue that the rates charged from the Mississippi River crossings to the Missouri River crossings are unreasonably and unjustly high.

Defendants answer this by asserting that a low division of the through rate for a long haul is not fairly comparable with the local rate between the same points; that the through rates are not made or controlled by them; that they are frequently made in competition with water transportation to the Pacific coast terminals or to the Gulf ports, and that while none of them can be said to represent less than the actual cost of the service they can not be considered in and of themselves as remunerative and can not be fairly taken as a measure of their rates. Manifestly, a carrier may not properly or lawfully engage in transportation at a rate less than the cost of the service. to do would place an improper and unlawful burden upon other traffic, but if a carrier elects to accept a low division of a through rate for a long haul rather than to stay out of that business, it can not be held to have thereby committed itself to that division as a measure of the reasonableness of its other rates for transportation between the same points on business from or to different destinations or of a different character.

Complainants argue that the cost of transportation on eastern and western roads is about the same; that the average rate per ton per mile received by the western roads is greater than that received by the eastern roads, and that the conditions of transportation are so substantially similar that it would be entirely fair to project to the Missouri River the same rate per ton per mile that represents the rates from the Atlantic seaboard to the Mississippi River. There are, however, differences in the

physical conditions. The density of population and of traffic is materially less west of the Mississippi River, and the cost of operation is greater, due, among other things, to higher wages and higher cost of fuel and other necessary supplies. It seems clear that the lines west of the Mississippi River are entitled to a somewhat higher charge than would be received for the same service on the lines east of the Mississippi River and it seems that the only question to be determined here is whether or not the class rates of the defendant carriers between the Mississippi River and the Missouri River cities on business from the seaboard and destined to the Missouri River cities are too high. It seems patent that any change in the rates east of the Mississippi River, even if warranted, would fail to accomplish what the complainants desire, because whatever of advantage accrued therefrom to the Missouri River cities would accrue to a like degree or extent to their principal competitive commercial centers to wit: New York, Chicago, St. Louis, and the Twin Cities.

The average short line distance between the nearest Mississippi River crossings and the individual Missouri River cities is about 275 miles. The average distance between the Mississippi River crossings, via which the rates apply, and the Missouri River cities, is 325 miles. As has been before stated, the local class rates between the Mississippi and the Missouri River crossings are, in cents per 100 pounds:

 $\frac{1}{60}$ $\frac{2}{45}$ $\frac{3}{35}$ $\frac{4}{27}$ $\frac{5}{22}$

And these are the rates that are added to the rates up to the Mississippi River crossings to make up the through rates from the Atlantic seaboard to the Missouri River cities. Are these rates, as so used, and the through rates resulting therefrom, unwarrantedly high or unduly discriminatory or unjustly prejudicial? Can they be changed without doing injustice elsewhere? (Rec., pp. 30, 31, 32.)

The local class rates between the rivers are high, but this is not the time to precipitate such a violent change as would follow an important reduction of them. The first-class rate from Buffalo to Chicago, about 540 miles, and from Pittsburg to Chicago, about 465 miles, is 45 cents. From Cincinnati to Chicago, 306 miles, it is 40 cents. (Rec., p. 33.)

An abundant share of the prosperity and development of the trans-Mississippi and trans-Missouri territories has come to the Missouri River cities, from which this complaint comes, but the fact that they have prospered in the past as a result of rapid expansion and development of new territory may not be taken as conclusive evidence of the correctness or justness at this time of the rate adjustment that has prevailed in the past. not impressed with the view that the system of making rates on certain basing lines should be abolished. No system of rate making has been suggested as a substitute for it, except one based upon the postage-stamp theory or one based strictly upon mileage. Either of these would create revolution in transportation affairs and chaos in commercial affairs that have been builded upon the system of rate making now in effect. It must not, however, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of, or hold upon. the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing or producing facilities, and increased traffic on railroads, create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption.

We can not agree with the argument that the rates from the Atlantic seaboard or from Chicago to the Missouri River cities should be the same as or lower than rates from same points to the Twin Cities. As has been seen, the rates to the Twin Cities can not escape the influence of the water and Canadian competition.

As has been stated, the through rates from Atlantic seaboard territory to the Missouri River cities are made by adding together the rates from points of origin to the Mississippi River crossings, using proportional rates when such are available, and the local class rates from the Mississippi River crossings to the Missouri River cities. The through rates so established are, in our opinion, unreasonably high. This is so because those portions of the through rates which apply between the Missis-

sippi River crossings and the Missouri River cities are too high. These are defendants' "separately established rates" which are "applied to the through transportation," and therefore the through rates should be adjusted by reduction of those factors or parts thereof which are found to be unreasonable.

Out of consideration for long-established custom in rate construction and publication, involving different classifications, we refrain from establishing joint through rates, and, permitting the rates from Atlantic seaboard territory to the Mississippi River crossings to remain as at present, we conclude that the separately established rates of the defendants, Chicago, Rock Island & Pacific; Chicago, Burlington & Quincy: Chicago, Milwaukee & St. Paul; Chicago & Northwestern, and Chicago Great Western Railway companies, applied between the Mississippi River crossings and the Missouri River cities to the through transportation of shipments moving under class rates and coming from the Atlantic seaboard, taking New York as representative, should be reduced to the following scale:

 $\frac{1}{51}$ $\frac{2}{38}$ $\frac{3}{30}$ $\frac{4}{23}$ $\frac{5}{19}$

and that these rates should also be applied to the transportation of through shipments which move under class rates and which originate at points of origin specified on pages 3 and 4 of complainants' Exhibit A, same being the aforesaid Western Trunk Line Tariff No. 786, I. C. C., No. 678, or at points taking the same rates.

These rates should also be applied on traffic from same points of origin destined to Sioux City, Iowa, when it moves through any of the Mississippi River crossings, East Burlington to East Dubuque, inclusive.

As to the other defendants, the complaints

should be dismissed.

An order will be entered in accordance with these views.

From the foregoing citations from the Commission's report it is abundantly demonstrated that the Commission based its decision solely upon the finding of fact that the through rates from the Atlantic seaboard to the Missouri River cities were unjust and unreasonable for the reason that the separately established rates for transportation between the Mississippi River crossings and the Missouri River cities were too high. The Commission did not establish joint through rates, but in its order required the carriers to reduce the separately established rates between the rivers as applied to through shipments from seaboard points to the following basis:

Taking these reduced rates between the rivers and combining them with the proportional rates up to the Mississippi River crossings gives the through rates for the first five classes from the Atlantic seaboard to the Missouri River cities as follows:

It is important to observe that the Commission refused to reduce the rates to the amounts requested by complainants, who demanded that the through rates should be reduced to

Furthermore, the Commission expressly held that the competition offered by water routes and by the Canadian railways very properly influenced the rates to St. Paul and Minneapolis, and that because of those factors the Missouri River cities were not entitled to the low rates accorded to the Twin Cities.

It is also important to keep in mind that the rate from New York to Omaha (taking these points as representative points in the respective territories) is not a joint through rate, but is a through rate; that the rate from New York to the Mississippi River crossings of 87 cents is a joint through rate applied on shipments destined to the Missouri River cities; and that the 60-cent rate is a "separately established rate" which is "applied to the through transportation."

The tariff complained of before the Commission is entitled "Joint Freight Tariff, W. T. L. No. 215." (Rec., p. 1090, Exhibit A to testimony before the Commission.) Manuscript, page 2343, of the exhibit gives class rates between Kansas City, St. Joseph, Atchison, Leavenworth, and East St. Louis, St. Louis, and points north on either bank of the Mississippi River to and including Dubuque, Iowa, and between Council Bluffs, Omaha, South Omaha, and Nebraska City and East St. Louis, St. Louis, and

points north on either bank of the Missouri River to and including Dubuque, Iowa. There is a note indicated by the dagger which provides: "Do not apply between Council Bluffs, Iowa, and points in Iowa on the Mississippi River north of St. Louis, Mo., as local rates, but do apply as proportions of through rates to or from Mississippi River points in Iowa north of St. Louis to East Dubuque."

The order of the Commission is set forth at page 80 of the record and is as follows:

This cause being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the day hereof, made and filed a report containing its conclusions thereon;

It is ordered that the defendants, the Chicago, Rock Island & Pacific Railway Company; the Chicago, Burlington & Quincy Railroad; the Chicago, Milwaukee & St. Paul Railway Company; the Chicago & Northwestern Railway Company, and the Chicago Great Western Railway Company be, and they severally are hereby, notified and required to cease and desist on or before the 25th day of August, 1908, from charging, demanding, collecting, or receiving for the transportation of property between the Mississippi River crossings, East St. Louis to East Dubuque, Ill., inclusive, and the Missouri River cities, Kansas City and St. Joseph, Mo., and Omaha, Nebr., and points taking the same rates, as parts of the through class rates on through shipments originating at the Atlantic seaboard point or at other points of origin, as specified on pages 3 and 4 of Western Trunk Line Tariff, No. 786, I. C. C. No. 678, or at points taking the same rates, their separately established class rates now in effect between said Mississippi River crossings and said Missouri River cities, which are, in cents per 100 pounds, as follows:

| Classes 1 | 2 | 3 | 4 | 5 |
|-----------|----|----|----|----|
| Rates 60 | 45 | 35 | 27 | 22 |

And to also cease and desist, on or before said 25th day of August, 1908, from charging, demanding, or receiving the above-named rates for the transportation of property between the Mississippi River crossing, East Burlington to East Dubuque, Ill., inclusive, and Sioux City, Iowa, when moving under class rates and when from above-described points of origin and destined to Sioux City, Iowa.

It is further ordered, that said defendants, the Chicago, Rock Island & Pacific Railway Company; the Chicago, Burlington & Quincy Railroad Company; the Chicago, Milwaukee & St. Paul Railway Company; the Chicago & Northwestern Railway Company; and the Chicago Great Western Railway Company, be, and they severally are, hereby notified and required to establish and put in force, on or before the said 25th day of August, 1903, and maintain in force thereafter during a period of not less than two years and apply to the

transportation of property between Mississippi River crossings, East St. Louis to East Dubuque, Ill., inclusive, and the Missouri River cities, Kansas City and St. Joseph, Mo., and Omaha, Nebr., and points taking the same rate, as parts of the through class rates on through shipments originating at the Atlantic seaboard points, taking New York as representative, or at other points of origin, as specified on pages 3 and 4 of Western Trunk Line Tariff No. 786, I. C. C. No. 678, or, at points taking the same rates, and destined to said Missouri River cities, or to points taking the same rates, class rates, in cents per 100 pounds not in excess of the following scale, to wit:

Classes.... $\frac{1}{51}$ $\frac{2}{38}$ $\frac{3}{30}$ $\frac{4}{23}$ $\frac{5}{19}$

It is further ordered that the rates herein established shall be applied to the transportation of property moving under class rates between Mississippi River crossings, East Burlington to East Dubuque, Ill., inclusive, and Sioux City, Iowa, and points take the same rates, as parts of the through class rates, on through shipments originating at Atlantic seaboard points, or at other points of origin as specified on pages 3 and 4 of said Western Trunk Line Tariff No. 786, I. C. C. No. 678, or at points taking the same rates when destined to Sioux City, Iowa, or to points taking the same rates.

It is further ordered that said defendants be and they are severally hereby authorized to make effective upon three days' notice to the public and to the Interstate Commerce Commission, given in the manner required by law, the various rates which said defendants are by this order required to establish and put in force on or before the said 25th day of August, 1908. The tariffs in which the rates are given must contain the notation that they are issued under the authority hereby granted, and must refer to the title and number of this case.

And it is further ordered that as to all the other defendants herein the complaint in this proceeding be and it is hereby dismissed.

After the decision of the Commission was published certain railroads which operate lines between the Mississippi and the Missouri rivers and which were not made parties to the proceeding before the Commission, presented to the Commission their petition to intervene and be heard before the order became The Commission declined to reopen the effective. case. Thereupon the railroad companies defendants before the Commission filed their bill of complaint in the circuit court for the northern district of Illinois, asserting that the order of the Commission was void and in excess of the power of the Commission, because among other things it compelled the complaining carriers to charge on shipments of merchandise which originated at the Atlantic seaboard territory for the transporation thereof between the Mississippi River and the Missouri River a less amount than that charged other shippers for the same transportation of a like amount of similar merchandise.

After the Commission had answered (Rec., p. 47) the circuit judges granted an application for a preliminary injunction (Rec., p. 71) and a restraining order was issued (Rec., p. 73).

By leave of court the railroad companies, not parties to the complaint before the Commission, and whose petition for intervention had been denied by the Commission, filed in the circuit court their petition of intervention as parties complainant. After complainants in the circuit court had rested their case and while a motion to dissolve the preliminary injunction was pending, certain shippers, being wholesale merchants and jobbers at Milwaukee, Chicago, St. Louis, Detroit, and Cleveland, by leave of court filed their petition of intervention as parties complainant. Thereafter the complainants before the Commission by leave of court were allowed to intervene as parties defendant.

Upon the final hearing the court was divided in its views, the majority opinion written by Judge Grosscup (Rec., p. 1054) held that the order of the Commission was unlawful and beyond the power of the Commission because it was the exercise of authority not specifically granted by the act to regulate commerce and resulted in artificially apportioning the country into zones tributary to given trade centers. In the dissenting opinion by Judge Baker it is stated that only two grounds for injunction are alleged (Rec., p. 1063):

One is that the new rates are confiscatory. There is no proof whatever that the rates which the Commission prescribed as just and reasonable are not sufficient to pay the cost of handling that traffic, to cover that traffic's full proportion of maintenance and overhead expenses, and to return to the carriers an ample net profit. Furthermore, proof is lacking that, if the carriers should reduce other rates to correct what they claim is the maladjustment caused by the Commission's order, the reduction would not leave them abundant net returns. For the purposes of this hearing, therefore, it must stand as an agreed fact that the present reduction is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation.

The other question was thus stated by Judge Baker:

Is the Commission's order void for want of jurisdiction? The question is not whether a lawful power or authority has been shown to have been wrongly exercised, but whether there is any law at all for the power or authority claimed and exercised. the opinion of the Commission in the Missouri River case in its entirety, it seems fairly clear to me (though certain parts removed from their context may create a doubt) that two issues were separately considered and passed The first was the reasonableness of the \$1.47 Seaboard-Missouri River rate in and of The fact of the \$1.15 rate from the Seaboard to St. Paul and the Chicago-Kansas City rate of 47 cents on traffic destined to Texas common points were profitable, was considered

as evidence that on the basis of cost of operation the Seaboard-Missouri River rate was "unreasonably and unjustly high." The other issue was what, if any, reduction should be made "without doing injustice elsewhere." In substance, it was found that the St. Paul rate was influenced by lake competition, and the Texas rates by Gulf competition; that it would not be fair to the Twin Cities to deprive them of that part of the difference (all the difference except 9 cents) which was fairly attributable exclusively to lake competition; and that the reduction to western jobbers could be made, with probably great benefit to the prosperity of the country as a whole, by reason of the extension and increased usefulness of centers of distribution, and without probably unduly affecting the commercial situation of Chicago and St. Louis In short, it seems to me that the Commission took into consideration all the pertinent facts and circumstances affecting the questions presented by the complaints before them.

If, however, it were conceded that the controlling consideration, without which the rate would not have been changed, was the Commission's intention to establish additional basing lines, the orders, in my judgment, would be within the power granted by Congress.

The dissenting opinion further holds that Congress did not intend to deny the right to the Commission to use the very system which the railroads had developed and established in this country. Judge Kohlsaat concurred in the majority opinion.

ASSIGNMENTS OF ERROR.

The following are the assignments of error which will be urged in this brief (Rec. 1072):

First. Said circuit court erred in not dismissing complainant's bill for want of equity.

Third. Said circuit court erred in holding that the Interstate Commerce Commission was without power to make the order complained of.

Eight to fourteen. The circuit court erred in permitting the railroads, that were not parties in the proceedings before the Commission, to intervene, and in permitting business interests of various cities also to intervene. The court erred in refusing to hold that the only proper or permissible parties in a suit to enjoin an order of the Commission are those carriers against whom the order is directed and the Interstate Commerce Commission.

Fifteen. Said circuit court erred in holding that there was no inquiry by the Interstate Commerce Commission respecting the reasonableness or unreasonableness of the rates between the Mississippi River and the Missouri River other than on the zone theory of apportioning trade.

Sixteen. Said circuit court erred in holding that the purpose of the Commission in its order of June 24, 1908, is to annul conditions upon which the trade centers of the country have grown up.

Seventeen. Said circuit court erred in holding that complainant carriers may predicate their right to relief from the order of the Commission upon allegations of injuries to shippers, based upon speculation. Eighteen. Said circuit court erred in refusing to hold that the determination of what is a reasonable rate for the future is a question of fact upon which the action of the Commission is conclusive, in the absence of any allegation of confiscation.

Nineteen. Said circuit court erred, under the issues herein, in permitting the introduction of any testimony.

Assignments of error were also filed by the codefendants which were allowed to intervene. Those assignments in substance set up practically the same errors as are urged by the Commission.

ARGUMENT.

T.

The power of the Commission.

We submit the following propositions:

- (a) Congress itself has power to fix the rates to be charged by railroads engaged in interstate commerce.
- (b) Congress may confer upon a commission the power to ascertain whether rates in force conform to the standard fixed by Congress, and if they do not, then to prescribe such rates as will conform to this standard.
- (c) The rates so fixed by Congress and the Commission become the law, and their reasonableness is not reviewable by the courts unless they amount to a confiscation of property.

(a) Congress itself has power to fix the rates to be charged by railroads engaged in interstate commerce.

A long line of decisions of this court sustains the proposition that the power to regulate the charges of public-service corporations is one of the powers of government inherent in every sovereignty.

Munn v. Ill., 94 U.S., 113.

C., B. & Q. R. R. Co. v. Ia., 94 U. S., 155.

Ruggles v. Ill., 108 U. S., 526.

Stone v. Farmers Loan & Trust Co., 116 U. S., 307.

Wabash R. R. Co. v. Ill., 118 U.S., 557.

Chicago R. R. Co. v. Minn., 134 U.S., 418.

Reagan v. Farmers Loan & Trust Co., 154 U. S., 362.

Smyth v. Ames, 169 U.S., 466.

Prentis v. Atlantic Coast Line, 211 U.S., 210.

Home Telephone Co. v. Los Angeles, 211 U. S., 266.

Wilcox v. Consolidated Gas Co., 212 U.S., 19. Knoxville v. Knoxville Water Co., 212 U.S., 1.

In Munn v. Illinois, supra, Mr. Chief Justice Waite said:

In countries where the common law prevails it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. * * * The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied.

The same Chief Justice in C., B. & Q. R. R. Co. v. Iowa, supra, said:

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn* v. *Illinois*, supra, p. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters.

In Smyth v. Ames, supra, Mr. Justice Harlan said:

A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and power from the State.

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the service rendered by it.

In Home Telephone Co. v. Los Angeles, supra, Mr. Justice Moody said:

The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation.

It is true that the foregoing cases concern only the regulation by state legislatures of the charges of public-service corporations. But the principle established is that there is inherent in the sovereignty of every government the power to protect its people against the exaction of unreasonable charges by the owners of property devoted to a public service. As Mr. Justice Harlan says, in the case cited above, a railroad company is subject to the legislative control either of the government which creates it, "or the government within whose limits it conducts its business."

In our Government any doubt that might arise upon the question has been silenced by the express grant of power to Congress in the commerce clause of the Constitution. The power conferred in section 8, of article 1, "to regulate commerce among the several States," expressly authorizes the control of rates and fares by railroads operating between the States. To hold otherwise would lead to the result that while the charges upon the railroads within the States may be controlled by the legislatures thereof, no power exists anywhere to control the charges upon railroads operating between the Such a conclusion would destroy the funda-States. mental principle announced in the cases cited above, that public-service corporations are subject to regulation by the government within whose limits their business is conducted.

In Wabash, etc., R. R. Co. v. Ill. (118 U. S., 557), where this court held unconstitutional a state statute which attempted to affect rates for the transportation of property beyond the limits of the State, Mr. Justice Miller, writing the opinion, says, at page 577:

As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States can not be overestimated. this species of regulation is one which must be. if established at all, of a general and national character, and can not be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been And if it be a regulation of commerce, said. as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

Even the three judges who dissented in the Wabash case on the ground that Congress not having legis-

lated in the matter the States were free to act, admitted that federal legislation would have been constitutional. Chief Justice Waite, writing the dissenting opinion, said (p. 581):

No one disputes that Congress might, if it saw fit, under its power to regulate commerce among the several States, regulate the matter under consideration; but it has not done so.

In Philadelphia S. S. Co. v. Pennsylvania (122 U. S., 326), in which this court decided that a state tax upon the gross receipts of a steamship company derived from the transportation of persons and property between different States, and to and from foreign countries, was in conflict with the powers of Congress under the Constitution, the following language was used (p. 338):

If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the State on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself.

In the Northern Securities case (193 U. S., 197, 368) Mr. Justice White said:

The plenary authority of Congress over interstate commerce, its right to regulate it

to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded.

The foregoing citations definitely establish the proposition that in fixing rates for the transportation of passengers or property the power exercised, whether it be by a state legislature or by Congress, is a regulation of commerce, and, under the commerce clause of the Constitution, one of the methods by which Congress may regulate interstate commerce is to fix such rates.

(b) Congress may confer upon a commission the power to ascertain whether rates in force conform to the standard fixed by Congress, and if they do not, then to prescribe such rates as will conform to this standard.

By the act of June 29, 1906, Congress has conferred upon the Interstate Commerce Commission the power to fix maximum rates. For nearly twenty years the original interstate commerce act had been on trial. Its want of real effectiveness had been clearly demonstrated. The orders of the Commission meant little more than the commencement of a lawsuit. The Commission was without power to establish rates, as this court found in the *Maximum rate case* (167 U. S., 479); and while its opinions and orders, finding a particular rate unreasonable, were always given

consideration by the courts, they were subject to the same review as if the Commission had been appointed by the court to examine the question and report its conclusions. In other words, the functions of the Commission were merely those of a referee appointed to make a preliminary investigation and report upon matters for subsequent judicial examination, and the facts found by the Commission were merely prima facie evidence in such judicial proceedings. (K. & I. Bridge Co. v. L. & N. R. R. Co., 37 Fed., 567; C., N. O. & T. P. R. R. v. Interstate Commerce Commission, 162 U. S., 184.)

All this is changed by the so-called Hepburn Act of June 29, 1906. Congress now declares the general rule that railroad rates for interstate transportation shall be reasonable and just, and empowers the Interstate Commerce Commission to enforce this rule by determining and prescribing the maximum of rates, which, in its judgment, after a full hearing, will be reasonable and just. By section 1 of the act, as amended, Congress declares the standard of rates, and prohibits therein any departure from such standard; all charges for the transportation of passengers or property "shall be just and reasonable; and every unjust and unreasonable charge" is declared to be unlawful, and prohibited. By section 2 undue discrimination is defined and forbidden. By section 3 undue or unreasonable preference or advantage is forbidden. By section 12 the Commission "is authorized and required to execute and enforce the provisions of this act." By section 13 the Commission is empowered to investigate any complaints filed with it and may institute inquiry on its own motion. By section 14 the Commission is required to make report, in writing, stating its conclusions and decisions upon any investigation made by it. section 15 the Commission is required, after full hearing upon complaint, whenever it is of the opinion that rates and charges are unjust or unreasonable, unjustly discriminatory, unduly preferential or otherwise in violation of any of the provisions of the act, to determine and prescribe what will be the just and reasonable rate to be thereafter observed as the maximum to be charged, and to make an order that the carrier shall cease and desist from such violation of the law, and shall not thereafter demand or collect any rate or charge in excess of the maximum prescribed by the Commission. By section 16 the Commission shall, if it determines that any party is entitled to an award of damages on account of any violation of the statute, make an order directing the carrier to pay to the complainant the sum to which he is entitled; and, finally, the Commission by various sections of the statute is authorized to make rules and regulations respecting the filing and publishing of tariffs and the making of reports to the Commission.

The more important provisions of the act of June 29, 1906 (34 Stat., 584), which are in point in the case at bar, are, in full, as follows:

Section 1. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 15. That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers. subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged: and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist. and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this act.

Section 13, referred to in the last section, is as follows:

That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts: whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall, in like manner, investigate any complaint forwarded by the

railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the

complainant.

Direct investigation by Congress into each particular rate and legislation thereon are impracticable by reason of the vast number of interstate rates and also because of the many subjects and interests continually requiring congressional action. Therefore Congress went no further than to declare what the general rule should be and to impose upon the Interstate Commerce Commission the duty of enforcing that rule by seeing to it that every rate complained of to the Commission is made reasonable and just. A denial to Congress of the right to delegate to a commission the power to ascertain the fact in each particular case as to whether or not the rate or regulation complained of is reasonable and just and to act thereon in conformity with the rule would exclude Congress from all practical supervision over the making of interstate rates by the railroads.

In England, from time immemorial, the charges for public service of every kind have been regulated by law, and as early as the seventeenth century Parliament conferred upon justices of the peace, acting administratively, the power annually "to assess and rate the prices of all land-carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common carrier or wagoner; and the rates and assessments so made to certify to the several mayors, and other chief officers of each respective market-town," and provided further that "no such common wagoner or carrier shall take for carriage of such goods and merchandises, above the rates and prices set, upon pain to forfeit for every such offense the sum of five pounds," etc. (2 Bacon's Abridgment, 160.)

Surely, if three hundred years ago conditions were such in the business of transporting merchandise that the Parliament of England found it expedient to commit to inferior agencies the fixing of rates for public carriage rather than to establish such rates by general laws, the enormous growth of trade and transportation, over great areas and by thousands of different routes and systems, in this country to-day would indicate the greater necessity not only for regulation but for intrusting the details of rate making to an administrative commission.

Forty States of the Union have established railroad commissions, or similar administrative tribunals, and upon many of them the power to regulate rates has been conferred. The rate-making power of such commissions has been uniformly upheld and is no longer open to question.

Railroad Commissiom cases (116 U. S., 307). Reagan v. Farmers' Loan & Trust Co. (154 U. S., 362).

Tilley v. Railway Co. (5 Fed., 641).

Chicago, etc., Ry. Co. v. Dey (35 Fed., 866). C., B. & Q. Ry. Co. v. Jones (149 Ill., 361). Georgia Ry. Co. v. Smith (70 Ga., 694). Express Co. v. Railroad Co. (111 N. C., 472). McWhirter v. Pensacola R. R. Co. (24 Fla., 471).

Steenerson v. G. Northern Ry. Co. (69 Minn., 353).

In Reagan v. Farmers' Loan & Trust Co., supra, Mr. Justice Brewer said (154 U. S., 393):

Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation. Railroad Commission cases (116 U.S., 307). No valid objection. therefore, can be made on account of the general features of this act; those by which the State has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the State.

United States Circuit Judge Noyes says in his book on American Railroad Rates (p. 207):

When a commission, in the exercise of power delegated by the legislature, makes a rate the result is the same as if the legislature directly acted. The act of the commission supplements and makes effective the act of the legislature. The rate resulting from the joint action of the legislature and its agent is the law. Making a rate in legal effect is making a law that such shall be the rate. The courts have only one inquiry with respect to such a rate—is it constitutional?

A dictum of Mr. Justice Brewer, in Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co. (167 U.S., 479, 494), plainly intimates that Congress has the power to regulate rates through a commission:

Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power,

and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so.

The statute under consideration in Stone v. Farmers' Loan & Trust Co. (116 U. S., 307) declared that rates should be just and not discriminatory, and then provided for the appointment of a commission to fix the rates. The supreme court of Mississippi held that the grant to this commission of the administrative powers conferred was not in conflict with the constitution of that State and Mr. Chief Justice Waite said (p. 336): "To this we agree, and that is all that need be decided in this case."

The interstate commerce act, as amended June 29. 1906, does not, in any true sense, confer upon the Commission legislative or judicial powers. Congress prescribes the general rule or standard with respect to rates, and the sole province of the Commission is to ascertain whether or not existing rates conform to such rule or standard, and, if they do not, to see that they do. In other words, the Commission inquires into and finds the facts upon which the legislation of Congress operates. If a rate in force is found to be reasonable, the statute is satisfied. after inquiry and hearing a rate is found to be unreasonable, the Commission determines what rate, under all the facts and circumstances, would be reasonable. and this rate, when so fixed, becomes a part of the act of Congress in all respects as if it had been written in the statute.

It is no new departure in legislation for Congress to confer upon commissions, boards, or individual officers the power to determine the existence of facts or conditions upon which depends the operation of a statute.

Field v. Clark (143 U. S., 693).

Buttfield v. Stranahan (192 U. S., 470).

Union Bridge Co. v. United States (204 U. S., 364).

St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor (210 U. S., 281).

In the tariff act of 1890 it was provided, in substance, that the free importation of certain articles should be suspended as to any country producing and exporting them that imposed exactions and duties on certain products of the United States, which the President deemed reciprocally unequal and unreasonable. Authority as fully as large is conferred upon the President by the maximum and minimum provisions of the tariff act of August 5, 1909. The statute of 1890 was attacked as a delegation of legislative power. This court in passing upon it in *Field* v. *Clark* (143 U. S., 693) said:

Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, "he may deem," in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffec, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable or the contrary in their effect upon

American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered.

In the case of Buttfield v. Stranahan (192 U. S., 470) this court was passing upon the validity of an act authorizing the Secretary of the Treasury, upon the recommendation of a board of experts, to fix and establish uniform standards of tea, and making unlawful the importation of any teas inferior to the standard so established. The court disposes of the contention that this is a delegation of legislative power as follows:

We may say of the legislation in this case, as was said of the legislation considered in Field v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate

foreign commerce could not be efficaciously exerted.

In the *Union Bridge case* (204 U. S., 364) this court upheld a statute authorizing the removal or alteration of bridges which, in the judgment of the Secretary of War, were unreasonable obstructions to navigation. In sustaining the act the court used these apt words, at page 386:

Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case separately, would be impracticable in view of the vast and varied interests which require national legislation from time to time By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came

within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases.

So in the interstate-commerce act Congress, if it had so elected, might, in some effective mode, have determined for itself primarily what rates were reasonable for the transportation of passengers and property. But investigations by Congress as to each particular rate alleged to be unjust or unreasonable, and direct legislation covering each rate separately, would be impracticable, in view of the vast and varied interests which require national legislation from time to time; by the act, therefore, Congress declared, in effect, that transportation in interstate commerce should be free from unreasonable rates and from unjust and unreasonable charges, and stopped with this general declaration of the rule, imposing upon the Interstate Commerce Commission the duty of ascertaining what particular rates come within the rule prescribed by Congress, as well as the duty of enforcing the rule in each case.

In the very recent decision by this court of St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor (210 U. S., 281) it was held that Congress in giving to the Interstate Commerce Commission authority to fix the uniform and standard height of drawbars for freight cars, under the safety-appliance act of March 2, 1893, had not delegated legislative powers. Mr. Justice Moody, delivering the opinion, said, at page 287:

It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standards should be fixed by the association and declared by the Commission. Nothing need be said upon this question, except that it was settled adversely to the contention of the plaintiff in error in *Buttfield* v. *Stranahan* (192 U. S., 470), a case which in principle is completely in point.

These cases fully sustain the proposition that the duty imposed upon the Interstate Commerce Commission to ascertain what are just and reasonable rates, and enforce the law requiring that such rates only shall be charged, is not a delegation of legislative power, and does not violate the provisions of the Constitution dividing governmental power into legislative, executive, and judicial.

(c) The fixing of rates is a legislative act. A rate prescribed by the rule of Congress, and an order of the Commission in conformity therewith, becomes the law and can not be set aside by the courts unless it violates constitutional rights.

That the function of making rates for the future, whether by a legislative body in the first instance or by an administrative tribunal in conformity with legislative authority, is a legislative act, is now well established. Under the interstate commerce act, as

amended in 1906, rates for interstate transportation are now made by the joint action of Congress and the Commission. Congress establishes the rule governing rates and the Commission completes the act by declaring what rates will conform to the rule. The rates thus finally ascertained and established become "the law of the land," with the same force and efficacy as if the very figures in the Commission's order were written in the statute. (Concurring opinion of Mr. Justice Miller in Chicago, Milwaukee & St. Paul Railway Company v. Minnesota, 134 U. S., 418, 459.)

These principles being once settled, the limits of judicial duty and power become apparent. The rate fixed must stand unless it appears, first, that the Commission failed to follow the procedure required by law, or, second, that upon the face of the proceedings the rate required would amount to a confiscation

of property.

The so-called "court-review" provision of the Hepburn Act is contained in section 15 (34 Stat., 589) and reads as follows:

All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. (Sec. 15, 34 Stat., 589.)

It is a most obvious mistake to assume that this provision of the Hepburn Act was designed to, or does, give to the federal courts any larger or different powers to protect the railroads from an invasion of constitutional rights than such courts would have possessed without any declaration on the subject. The "court review" amendment merely confirms the jurisdiction of the courts, specifically defines the venue, and authorizes suits against the Commission as an agency of the Government. The history of this legislation supports no other conclusion.

A significant fact appears in the amendment of section 16. Under the old act of 1889, where proceedings were authorized to enforce by injunction, mandamus, or otherwise, an order of the Commission. the statute read "If it be made to appear to such court on such hearing * * * that the lawful order * * * of said Commission * * * has been violated or disobeyed," etc. As the amendment of 1906 passed the House of Representatives this provision was changed to read that "If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly passed and duly served," etc. When the bill passed the Senate the word "regularly" was stricken out and the word "lawfully" inserted. The bill went to conference, and ultimately the Senate receded from its amendment, known as amendment No. 39, and the conferees inserted instead of the word "lawfully" the word "regularly," and in this form the bill was enacted.

It thus appears that a suit to set aside an order of the Commission is not a mere appeal from an inferior to a superior tribunal. There is no authority for the substitution of the court's judgment for the Commission's judgment in ascertaining the reasonableness of a rate. The only thing before the court, if the Commission proceeded regularly under the statute, is the result reached. If that result shows clearly an attempt to destroy the property rights of the railroads the order of the Commission will be set aside; otherwise it will not. The courts can not inquire into the steps by which the result was reached, nor consider the methods which induced the fixing of the rate. They have the same, and no greater, power to review the reasons which controlled the Commission as they would those of Congress, if the rate had been fixed by Congress. They have the same, and no greater, power to revise or modify rates made by the Commission as they would if such rates had been made by Congress. Their province is, we submit, first, to ascertain whether or not the Commission has proceeded regularly, and, if it has, then to take the rates fixed, measure them by the facts found by the Commission, or otherwise appearing in the record, and if such rates are clearly so low as to constitute the taking of private property without compensation, then to enjoin the enforcement of the Commission's order.

These propositions are fully sustained by many decisions of this court, some of which are among those most recently announced. In *Knoxville* v.

Water Co. (212 U. S., 1, 8, 18) Mr. Justice Moody says:

* * * the function of rate making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. * * * There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases.

* * * * *

The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind.

In Prentis v. Atlantic Coast Line Co. (211 U.S., 210) it was held that the making of a railroad rate is a legislative and not a judicial act. Mr. Justice Holmes says, at page 226:

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by section 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already

to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind.

And on page 227:

The nature of the final act determines the nature of the previous inquiry. when the final act is legislative, the decision which induces it can not be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law res adjudicata, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called.

In Willcox v. Consolidated Gas Co. (212 U. S., 19, 41)

Mr. Justice Peckham said:

The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. (San Diego Land & Town Company v. National City, 174 U. S., 739, 757; Same v. Jasper, 189 U. S., 439, 442.)

Many of the cases are cited in *Knoxville* v. Water Co., just decided, ante, page 1. The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates.

In San Diego Land Co. v. National City (174 U. S., 739) Mr. Justice Harlan, discussing the limitations of judicial power in cases brought to test the validity of public service rates fixed by legislative authority, says:

* * * judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the

rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

Judge Noyes says in his book on American Railroad Rates (pp. 203, 204):

The legislature can not confer upon the courts power to make future rates; nor can it confer what is equivalent—power to revise rates made by a commission and to modify its If the courts could exercise the same discretion in reviewing a rate as the commission exercised in making it, the functions of both would be the same—and both would be A statute imposing any such nonlegislative. judicial duties upon the courts would be unconstitutional. The functions of the judicial department are separate and distinct from the They can not be commingled. other two. Neither directly nor indirectly can the courts be required to perform duties properly belonging to another department of the Government.

Mr. Justice Brewer said in the Reagan case (154 U. S., 397):

The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreason-

able, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation.

The extent of the judicial power to be exercised by the Circuit Court when a carrier attacks an order of the Commission was determined by this court at the present term in the case of Interstate Commerce Commission v. Illinois Central Railroad Company (215 U. S., 452; decided January 10, 1910). That case involved the question of whether a duty rested upon the railroad company to obey an order of the Commission which regulated the distribution of coal cars by the railroad. Mr. Justice White said (p. 470):

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein. because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. (Postal Telegraph Company v. Adams, 155 U.S., 688, stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

Power to make the order, and not the mere expediency or wisdom of having made it, is

the question.

In closing his opinion, Mr. Justice White referred to certain arguments urged against the order of the Commission which attempted to show that the order would effect discriminations. He said:

At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and

upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils.

In Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co. (215 U. S., 481, 494) Justice White said:

In considering section 15 in the case of Interstate Commerce Commission v. Illinois Central Railroad Co., just decided, ante, page 452, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency.

See also

Interstate Commerce Commission v. Chicago & Alton Railroad Co. (215 U. S., 479, at p. 480).

Honolulu Rapid Transit Company v. Hawaii (211 U. S., 282).

Southern Ry. Co. v. Tift (206 U. S., 428). Cincinnati & Railway Co. v. Interstate Commerce Commission (206 U. S., 142).

In Steenerson v. Great Northern Railway Company (69 Minn., 353) the state court was considering a statute which provided for a court review after a rate had been fixed by the state commission on complaint and hearing. The statute declared that there should be an appeal from the commission to the district court, and "upon such appeal * * the

district court shall have jurisdiction to and it shall examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify, and reverse such order in whole or in part as justice may require; and in case of any order being modified as aforesaid such modified order shall for all the purposes contemplated by this act stand in place of the original order so modified * * *."

In regard to this provision the court said, pages

375-376:

If by this the legislature intended to provide that the court should put itself in the place of the commission, try the matter de novo, and determine what are reasonable rates without regard to the findings of the commission, such intent can not be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one. (State v. Chicago, 38 Minn., 281, 298; 37 N. W., 782.) And the performance of such duties can not. under our Constitution, be imposed on the judiciary. (Foreman v. Board, 64 Minn., 371; 67 N. W., 207; State v. Young, 29 Minn., 474; 9 N. W., 737; Reagan v. Farmers, 154 U. S., 362; 14 Sup. Ct., 1047.)

But it is not necessary to construe this statute so as to render it unconstitutional. It does not by express words, or even by necessary implication, provide that the court shall stand in the shoes of the Commission and try

the matter de novo.

The district court may review the findings of the Commission only so far as to determine whether or not the rates fixed are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it can not stand.

Of course, in determining whether the rates fixed are confiscatory the court must incidentally consider what are reasonable rates, but it must also resolve every reasonable doubt on that question in favor of the findings of the Commission.

The Hepburn Act is free from the fault criticised by the court in the statute referred to above. In speaking of the function of the courts it uses the words "suspend," "set aside," "enjoin," or "annul" an order of the Commission; not once do the words "affirm," "modify," or "reverse" appear. Section 15 says:

All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction.

Section 16 provides:

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or sus-

pend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office * * *.

This section also declares:

That no injunction, interlocutory order, or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission.

These cases upon the general proposition, and these specific provisions of the interstate commerce act as now in force, make full answer to any claim that the work of the Commission, the process by which its conclusions were reached, or the mere reasonableness of a rate fixed within constitutional limits are subject to judicial review. Just as Congress can not commit errors of law which are subject to review and reversal by the judicial branch of the Government, so the Commission's action in prescribing rates in conformity with the standard required by Congress is not subject to review by the courts as to errors in considering certain facts, refusing to consider other facts, pursuing a method which the court would not have pursued, or, finally, fixing a rate which is lower than the court would have fixed.

The only question is: Do the pleadings or record show that the rates fixed by the Commission are clearly and beyond all doubt so low that their enforcement will necessarily amount to a confiscation of property? The act of the Commission was in full conformity with the requirements of the statute.

In the bill of complaint (Rec., p. 5) it is averred in substance that a complaint was filed February 11, 1907, before the Commission, by Burnham, Hanna, Munger Dry Goods Company, a corporation, and others, against certain railroad companies, complainants here (a copy of the complaint was attached to the bill of complaint as Exhibit A, Rec., p. 14); that thereafter in due time answers were filed by the defendants; that various eastern railroads were made parties defendant to said proceeding (Rec., p. 6); that after the filing of the answers hearings were had upon the complaint. Thereupon, the Commission rendered its opinion and entered its order in the premises on June 24, 1908.

In the answer of the Commission it is averred, after setting forth the filing of the complaint and the answers thereto (Rec., p. 52), that thereafter a full hearing was had at which evidence was offered, both oral, and documentary, by both complainants and defendants; that oral and printed arguments were had before the Commission; that none of the carriers defendant before the Commission asked to have received other evidence than that which was before the defendants; that the Commission gave full consideration to all facts and arguments and to all reports filed with the defendants by the complainants in accordance with the statute in such cases made and provided.

Section 13 of the act to regulate commerce provides for the filing of complaints by petition on the part of any person or corporation or association of merchants or manufacturing society "of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof;" that a "statement of the charges thus made shall be forwarded" by the Commission "to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified" by the Commission; that if such common carrier "shall not satisfy the complaint within the time specified, or there shall appear to be no reasonable ground for investigating said complaint, it shall be the duty" of the Commission "to investigate the matters complained of in such manner and by such means as it shall deem proper."

By section 14 of the act it is provided that whenever an investigation shall be thus made by the Commission "it shall be its duty to make a report in writing in respect thereto which shall state the conclusions" of the Commission, "together with its decision, order or requirement in the premises;" and that all reports of investigations made by the Commission "shall be entered of record and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

By section 15 of the act it is provided that the Commission "is authorized and empowered, and it

shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 * it shall be of the opinion that any of the rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers," subject to said acts, "for the transportation of persons or property, as defined in the first section" of said acts, "are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions" of said acts, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and to make an order that the carrier shall cease and desist from such violation to the extent to which the Commission find the same to exist. and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

By section 16 it is provided that every order of the Commission "shall be forthwith served by mailing to one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail;" and the Commission is "authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

In the court below complainants did not deny, and no doubt will here admit, that the complaint before the Commission, answers filed thereto, full hearings, and the publication and service of the order of the Commission were all had in full accord with the procedure required by statute.

It is well recognized that one who undertakes to set aside an order of the Commission assumes the burden of showing its invalidity. That burden can be sustained only by showing that the order was made by the Commission when the Commission had no jurisdiction to make it by reason of irregularity, defect in procedure, or a want of power in the Commission, or when the effect of the order is to deprive the carrier of a constitutional right.

The evidence before the Commission was not presented to the court by the complainants herein but was introduced by the intervening defendants. No contention was made by the complainants that the Commission was without any evidence upon which to base its findings. While the burden is not upon the appellant to show that the Commission did have evidence upon which to found the order reducing the rates, it is not improper here, by reference to the record, to point out the nature of the evidence and its scope and pertinence to the matter under consideration.

Beginning at page 721 of the record, there is set forth the full testimony, as transcribed in hearings before the Commission, together with certain exhibits referred to in the examination and put in evidence before the Commission by complainants and defendants. Various facts which properly should be considered in any question involving the reasonableness of rates are contained in the record. (Page numbers are those upon which the testimony is first given, which in some instances follows through a number of pages.)

| Page.) |
|--|
| Competition |
| Relation of rates and relative rates |
| |
| 798, 800, 804, 425, 832, 856, 863, 928, 954 |
| Comparison of mileage and mileage rates |
| Cost of operation 781, 821, 824 |
| Earnings 784, 824, 932, 938 |
| Reduction of cost of operation; increased volume and economy of |
| operation 796, 898, 1019 |
| Profits 802, 854, 947 |
| Tables of rates 997, 1022 |
| Table showing equalized rates |
| Divisions of rates 1009, 1014 |
| Tables showing freight rates of various carriers |
| Table showing revenue per ton per mile of various carriers 1021 |
| Comparison of operating expenses to earnings 1021 |
| Table showing surplus earnings 1022 |
| Table showing rates have increased, while cost of operation has de- creased |
| Table showing tonnage and revenue derived therefrom on a large |
| number of commodities and classes in territory affected by the order |
| |

It was also stated during the course of hearing before the Commission that all documents required by law to be filed with the Commission as far as pertinent to the question under consideration should be considered by the Commission.

Section 20 of the act to regulate commerce requires special and detailed reports as well as annual reports to be filed with the Commission, making a full exposition of expenses and revenues, and that all such reports are to be considered by the Commission without further authentication. There were also given by various expert witnesses on behalf of the complainants and on behalf of defendants, opinions as to the effect of certain proposed rates. A cursory examination of the information which is contained in the record herein will demonstrate that there was ample evidence upon which to base a reduction of the rates. When to this is added the Commission's knowledge, acquired by an experience of many years given to considering questions of rates, their reasonableness and whether discriminatory or not, costs of operation and revenue. there can be no basis for a finding that there was no evidence warranting the action taken by the Commission. This court announced in the Citrous Routing cases (200 U.S., 536) that the question to be considered in a suit of this sort is not the reason given by the Commission for its order, but whether the order is lawful upon any ground. Under the Hepburn Act the Commission is not required to write opinions, and is only required to make its order and a report showing its action in every given case.

It was admitted by one of the carriers, The Chicago, Burlington & Quincy, in its answer before the Commission (Rec., p. 990), that its revenue for hauling transcontinental traffic from Chicago to the Missouri River afforded it "some profit." That revenue was 33 cents per 100 pounds on first class. Under the Commission's rate that carrier will receive, upon first-class traffic when originating at the seaboard and destined to Missouri River cities, for the haul from Chicago to the Missouri River $66\frac{\pi}{10}$ cents. If

33 cents represents some profit, $66\frac{7}{10}$ cents must represent more than 100 per cent profit.

It must be remembered that the Commission can act only upon a specific complaint. The complaint in this case was directed only against the rates charged by certain carriers upon class traffic originating at the Atlantic seaboard and destined to the Missouri River cities. Part of the complaint was directed toward the rate applied by defendants for the transportation of such traffic from the Mississippi River to Missouri River cities. no complaint against the 60-cent rate as applied to all traffic. The Commission has repeatedly held that it can reduce only the rates that are made the subject of specific formal complaint and which, after a full hearing, are shown to be unlawful. the case of Kindel v. N. Y., N. H. & H. R. R. Co. et al. (15 I. C. C. Rep., 555) the Commission held:

> We are authorized to reduce a rate or modify a rule of principles which affects a rate only after full hearing and complaint, and no order can be entered by the Commission affecting a carrier's rates and regulations except after such carrier has been given full and fair opportunity to be heard.

To the same effect was the holding in the case of Spokane v. Northern Pacific Railroad Co. (15 I. C. C. Rep., 376, 422):

While the complaint attacks generally all commodity rates to Seattle which are less than those upon the same article to Spokane, only 34 of these rates are specifically referred

to. No testimony was taken as to any articles except these and in the view which the Commission has taken of its authority under the statute we can only fix specific rates upon these articles which have been made the subject of specific complaint, although we must consider what our probable action would be if required to pass upon the remainder of these commodity rates and its probable effect.

Shortly after the decision by the Commission in the Burnham, Hanna, Munger case, it announced its decision, order, and requirement in a case brought by the Indianapolis traffic bureau complaining of rates from Indianapolis to Kansas City. The complaint in this last-named case was directed against the through rate and, as a part thereof, against the 60cent rate applied on Indianapolis traffic for the haul from St. Louis to Kansas City. The Commission found the rate unreasonable and reached that conclusion because the rate between the rivers as a part of the through rate was unreasonable. Following out the principle laid down in the Burnham, Hanna, Munger case, that the longer the haul the less the rate per ton per mile should be, it reduced the portion of the rate applying between the rivers from 60 cents to 55 cents. (No. 1042 before Commission, decided April 14, 1909, 16 I. C. C. 56.)

In a case brought by the Greater Des Moines Committee (Incorporated), against The Chicago, Rock Island & Pacific Ry. Co., the Commission reduced the rate applying to shipments from various eastern points for the portion of the haul from the Mississippi River

to Des Moines about 12½ per cent. Suit was brought to enjoin that order, but no action has been taken other than the filing of the bill. The reduced rates are now in effect. (Nos. 1231 and 1289 before Commission, decided June 25, 1909, 17 I. C. C. 54.)

About the same time a complaint was filed before the Commission attacking the local rate from Chicago to Des Moines. This rate the Commission reduced, and the reduced rate is now in effect. It therefore appears that whenever any person interested in rates from Central Freight Association territory has complained to the Commission of rates to the Mississippi River, the Missouri River, or intermediate points, the Commission has given the complaint attention and has granted such relief as to the Commission seemed proper. All acts of the Commission have been in harmony with the proposition that it can act only upon a specific complaint.

In the bill of complaint (Rec., p. 11) it is averred "that the said order of the said Interstate Commerce Commission misapplies the law and compels your orators to serve a certain class of people, to wit, the shippers at the Atlantic seaboard, at an unreasonably low rate, as hereinbefore set forth, and at a rate lower than is charged shippers at Chicago and St. Louis for a like service, which involves to your orators less expense."

This is the only allegation in the bill upon which can be based any contention of unjust discrimination. If the strict rule of interpreting a pleading, when in doubt, against the pleader, controls, we think the proper construction to be given that pleading is that it alleges that the rate prescribed by the Commission is an unreasonably low rate. And in support of that allegation the bill then alleges that the rate so prescribed is less than is charged shippers at Chicago and St. Louis, which latter service involves less expense.

There is no sufficient allegation in the bill of complaint, and certainly no evidence in the record which shows or tends to show, that the rate prescribed by the Commission, 51 cents on first-class seaboard shipments for the haul from the Mississippi to the Missouri River is not sufficiently remunerative. Nor is there any allegation or testimony to the effect that the complainants could not remove any discrimination resulting from the Commission's order without putting into effect rates so low as to be confiscatory. In the light of these facts can the complainants claim any right to relief?

Assuming for the sake of argument that a discrimination among shippers may result from the Commission's order, the query arises, Can the complainants invoke relief? By what principle of equity may the carriers complain and ask for an injunction against the order of the Commission on the ground that unjust discrimination results as to some shippers, some traffic, or some locality, and an undue preference and advantage as to other shippers, traffic, or locality? One of the maxims of equity is that one party can not be permitted to invoke relief in equity in a suit based upon wrongs inflicted upon another. The

party injured is the one who must invoke the relief. A contention very similar to that voiced by the complainants at the arguments in the court below was made in this court in the *Consolidated Gas case* (212 U. S., 19). We quote from the opinion of Mr. Justice Peckham:

Lastly, it is objected that there is an illegal discrimination as between the cities and the consumers individually. We see no discrimination which is illegal or for which good results can not be given. But neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether, by the reduced price to the city, the complainant is upon the haul enabled to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.

We can not see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supply as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return, it is not important that with relation to some customers the price is not enough."

The intervening complaining shippers did not ask leave to file their petition until the case came on for hearing, after complainants had rested and announced that they had no further testimony to offer, upon defendant's motion to dissolve the preliminary injunction. Even if shippers have a right to invoke the jurisdiction of a court in equity in a suit of this kind, they certainly can not be allowed to file an intervening petition where the carriers have not set forth grounds for invoking relief at the hands of the court. There being no sufficient allegation in the bill of complaint, and no proof in support of an allegation, of confiscation, and the only remaining allegation being predicated upon the rights of others, such other parties can not come into court in the pending proceeding, but must file a separate and distinct bill of complaint. Furthermore, even if the carriers might in some state of facts invoke the rights of others against an order of the Commission, based upon discrimination against such other parties, they can not do it in this case because they must first allege and prove that they can not remove the unjust discrimination resulting from the Commission's order without suffering such a loss of revenue as will on the whole render the order confiscatory in its effect.

III.

Under the issues herein none of the testimony was admissible.

Proper objections were made prior to the taking of testimony; after the objection had been overruled (Rec. pp. 123, 136, 192), and at the conclusion of the case, defendant moved to strike from the files all the testimony on the ground that under the issues such testimony was immaterial and irrelevant (R. p. 1047).

No contention was made below, and can not with proper basis be made in this court, that 51 cents on first-class traffic originating at the seaboard and destined to Missouri River cities is not an ample and fair return for that portion of the haul from Mississippi River crossings to destination. None of the testimony was offered to support any such contention. The reference to the special examiner was for the sole purpose of obtaining testimony to determine whether the order of the Commission would cause an unjust discrimination against the · Central Freight Association territory. We think we have already shown that such a contention is not a proper basis upon which to ask relief from the order. Not having invoked confiscation as a ground for annulling the order, and the only other ground invoked being untenable and immaterial, it follows that there is no issue of fact upon which testimony could be presented to the court. We believe that in this case the court erred materially in permitting reference to the special examiner; that if any testimony is to be considered by the court it should be confined to the record before the Commission, when there is an absence of showing that new evidence has been discovered or that the Commission refused to accept proffered testimony, or the complainants allege fraud or arbitrary action upon the part of the Commission or parties appearing before it. One of the patent defects under the old act to regulate commerce was due to the fact that the courts permitted additional testimony to be presented when the carrier was sued to compel obedience to the Commission's order. This court took occasion to criticise the carriers in withholding their case until the Commission had made its order and gone to the circuit court to enforce the same. (Cincinnati, New Orleans & Texas Pacific Co. v. Interstate Commerce Commission, 162 U.S., 184.) Of course there may be an exception when there is an allegation that the rates prescribed by the Commission are so low as to deprive the carriers of the protection accorded by the fifth amendment to the Constitution. But this case does not come within that exception.

IV.

Even if unjust discrimination could be urged as a basis for enjoining the order of the Commission, the evidence offered by complainants wholly fails to establish any unjust discrimination resulting from said order.

Complainants introduced at the various hearings before the special examiner eighteen witnesses. These witnesses may be divided as to personnel, occupation, or business, into two classes. First, railroad officers or employees; second, shippers or shippers' representatives.

The testimony of the railroad men was directed to the increased cost of handling Atlantic seaboard business destined to Missouri River cities due to the transshipment of such traffic at Chicago or St. Louis, and to the discrimination which they asserted would be brought about by reason of the enforcement of the Commission's order. Testimony as to the increased cost due to the transshipment at Chicago is wholly immaterial to the issues in this case for two reasons.

- (a) The joint rate of 87 cents to the Mississippi River crossings from St. Louis on the south, to Dubuque on the north, includes all expenses to the carriers of taking the traffic to the Mississippi River crossings; that is to say, both the cost of taking the traffic at Atlantic seaboard points and carrying the same to Chicago by the carriers operating from the seaboard to Chicago and the cost of carrying it to the Mississippi River crossings and by the carriers taking the traffic at Chicago are covered by the rate of 87 cents.
- (b) If that increased expense be pertinent to the issues in this case, the testimony shows without contradiction that the same cost of handling at Chicago and St. Louis from the eastern carrier to the western carrier is incurred on all traffic originating to the east of Chicago and St. Louis and destined to points west of Chicago and St. Louis. Transcontinental traffic, for the carriage of which from Chicago to the Missouri River the complainants receive 33 cents, causes exactly the same expense as the seaboard traffic for whose carriage between the same points, perhaps in the same cars or same train, the carriers receive under the Commission's order $65\frac{7}{10}$ cents.

It might be urged as an additional reason for not considering such testimony that it is relevant only upon the question of confiscation, and there is no attempt to show such an effect from the Commission's order.

The testimony of the railroad men which was directed toward discrimination resulting from the order of the Commission, consisted of two elements. First, it was alleged that all business prior to the making of the order was being carried on upon the existing relation of freight rates, so when any considerable portion of the rates to a competitive market or common market is reduced the result must be a change of basis whereby those having the benefit of the reduced rate would have an advantage over those shippers for whom and localities from which the rates were not reduced.

The defect with this theory is that it is based upon the premise that all existing rates were then just and reasonable. This premise can not be, because of the finding of the Commission that the rates applied to seaboard shipments for the transportation from the Mississippi River to the Missouri River were unjust and unreasonable. The whole purpose of the act to regulate commerce was to cure existing evils. The testimony of the same witnesses seems also to be based upon the theory that by having been long in existence a wrong becomes right. It would appear to follow from the position of these witnesses that where railroad companies by previously established systems of rates have built up favored localities, and have destroyed localities not meeting with the favor of the railroads, the Commission is powerless

to reduce particular rates which are too high because such action would disturb existing commercial conditions. Such a holding strips the Commission of power to correct evils or to reduce rates which after investigation are found to be too high. The whole spirit and intent of the statute supports a contrary view.

While it may be conceded upon the record in this case that the witnesses who are railroad men are experts, it must be with the limitation that they are experts in transportation only, and not such experts as could foretell the effect of the order upon trade in commercial centers. They knew nothing and could know nothing of the profits enjoyed by interests alleged to be adversely affected by the Commission's order. They could not know, and did not pretend to say, that the shippers not receiving the benefit of the reduction could not absorb the difference in freight rates and still have a profitable business.

The second class of witnesses was composed of shippers, and their direct testimony and crossexamination show substantially the following:

An official in a can company at Detroit said that the full effect of the reduced rate under the order of the Commission would be a reduction in profit from \$12,000 on Missouri River business to \$10,500. (Rec., 249.)

A representative of one of the large paint companies testified that, in his opinion, it would adversely affect his concern, but he did not know what the profit made by his concern amounted to, nor what the effect of the increased freight cost would be on that profit. A large portion of his business was carried upon commodity rates unaffected by the Commission's order. (Rec., 253, 256.)

A hardware representative testified that under existing freight rates his concern at St. Louis did business in Massachusetts when his competitors were located in Boston. He did not know that the order would reduce the volume of his business and the effect was purely conjectural. It was shown that he sold railroad supplies to the complainants, who were good customers of his. (Rec., 300, 330.)

A jobber and commission man engaged in the purchase and sale of heavy chemicals thought that the effect of the order upon his business would be adverse. He said that one-half his business was carried on commodity rates and the balance largely consisted of third and fourth class traffic. (Rec., 312, 316.)

One of the largest shoe companies at St. Louis said that its business would be affected to the extent of reducing its profits from \$722,000 to \$717,500. (Rec., 326.)

A representative of Marshall Field & Co. thought that the effect would be bad upon his concern, but if his information as to this effect is no greater nor more reliable than his statement that Marshall Field & Co. had made no profit for twenty-five years, then it does not afford much basis for a finding of discrimination. It was disclosed upon cross-examination that the foundation for his statement that Marshall Field & Co. had made no profit, was the fact that he had asked for an increase in salary and had received the same story each time, "No money in the business." (Rec., 350, 356.)

A representative of a large wholesale grocer at Chicago thought the order would result in handicapping his concern, but he could not say what percentage of his firm's business consisted of trade at the Missouri River cities. Much the larger portion of his business was transacted in the States immediately surrounding Chicago. (Rec., 378, 391.)

The only witness who was a representative of any traffic bureau or city, in a collective sense, was the traffic manager of the Quincy Freight Bureau. (Rec., 394.) That city had been enabled to reach its present status, "the largest manufacturing city in the Mississippi Valley north of St. Louis and having a greater diversity of articles manufactured" 395), under a system of rates whereby Quincy had paid 124 per cent of the Chicago seaboard rate (Rec., 399), while St. Louis, its principal competitor, enjoyed a rate of 116 per cent. He further stated that Rock Island, Moline, and Davenport, the Tri Cities, had been built upon a rate of 122 per cent of the New York-Chicago rate (Rec., 410). Traffic to the Missouri River cities was carried through Quincy and the Tri Cities at 116 per cent of the New York-Chicago rate. In spite of that handicap Quincy and the Tri Cities had been able to compete successfully with the Missouri River cities. (Rec., 408.)

The utmost effect that could be given to the testimony offered on behalf of complainants is that it shows in some instances certain shippers would not have as great a profit on certain of their sales if they competed with the Missouri River cities or the Atlantic seaboard shippers. The amount was not definitely shown but it is certainly so small as to be negligible.

The best evidence of the effect upon Chicago and St. Louis of reducing the proportion of the rate upon through business while the local rate was not so reduced, is actual experience. For many years the through rate from New York to St. Paul and Minneapolis has been \$1.15 per hundred pounds, the carriers from Chicago to St. Paul and Minneapolis receiving 40 cents for their portion of the haul while at the same time, the local rate for the haul from Chicago to St. Paul was 60 cents. No claim has been made by anyone that that adjustment has unjustly discriminated against Chicago or unduly preferred New York or St. Paul interests, and it is interesting to observe that every one of the carriers complainant in this case operates between Chicago and St. Paul, as well as between Chicago and the Missouri River cities. If these carriers can haul through traffic from Chicago to St. Paul without unjustly prejudicing Chicago, would it not seem that a similar haul could be made to the Missouri River cities when the difference brought about by the Commission's order is only 9 cents on first class as compared with 20 cents on the St. Paul haul? The evidence utterly fails to show any unjust discrimination resulting from the Commission's order.

The unjust discrimination alleged to be imminent as a result of the Commission's order is based upon the theory that it changes the existing relation of freight rates into the common markets on the Missouri River. It appeared from the testimony of Mr. Crosby, freight traffic manager of the Chicago, Burlington & Quincy, that for many years refunds (Rec., p. 200, 201) on a large proportion of class traffic into Missouri River cities from seaboard points was paid to the amount of 10 per cent of the through rate of \$1.47, or 14.7 cents. If business of the other carriers was transacted in a similar manner to that of the Burlington, it would appear that prior to the passage of the Hepburn Act seaboard traffic into the Missouri River cities was carried at \$1.32.3, while under the Commission's order it is carried at the rate of \$1.38. Instead of discrimination being in favor of the Missouri River cities or the seaboard points, they would, under the Commission's order, do business under a handicap of 5.7 cents as compared to the situation prior to the passage of the Hepburn Act. There is no showing in the record that any of the shippers from Central Freight Association territory received any allowance or reduction upon their freight rate. The presumption is that they paid the full published tariff and are doing so at the present time. Upon this phase of the case there certainly can be no finding that the Commission's order creates an undue preference in favor of the seaboard or Missouri River shippers.

CONCLUSION.

The burden of proof resting upon complainants before their contentions can prevail has not been made. It clearly appears that the Commission in its every act, from the filing of the complaint to the service of the order upon the complainants, acted in full accord with the procedure prescribed by the statute. No attempt has been made to show that the rates prescribed by the Commission are not in and of themselves just and reasonable and fully compensatory to the carriers for the service which they perform. There appears no injury or wrong to any industry, individually or collectively. Complainants before the Commission demonstrated that they were paying excessive and extortionate rates. The body charged under the statute with the duty of determining for shipper, for carrier, and for the public what are just and reasonable rates has performed its duty. Its order should be complied with. The bill of complaint under which for nearly two years the carriers have been able to collect charges to which the Commission found they were not entitled should be dismissed.

It is respectfully submitted that the decree should be reversed with directions to dismiss the bill.

WADE H. ELLIS,
LUTHER M. WALTER,
EDWIN P. GROSVENOR,
Special Assistants
to the Attorney-General.

Special action of the second section of the second

INDEX.

| | PAGE |
|---|------|
| STATEMENT | 2 |
| Two Appeals from Decree Annuling Order of Commission | 2 |
| GENERAL OUTLINE OF THE CASE | 2-5 |
| Complaint before the Commission—finding of Commission—local rates between the Rivers too high when part of through rate—original bill. Parties. | |
| THIS BRIEF FILED ON BEHALF OF SHIPPERS OF C. F. A. TERRITORY | 4 |
| The reasons for contending that the order of the Commission is contrary to law and in ex- cess of the powers of the Commission. | |
| THE RAILWAY SYSTEMS BETWEEN THE ATLANTIC SEA- BOARD AND THE MISSOURI RIVER. Description of railroads affected by the order—no through line between Atlantic Seaboard and Missouri River— the building of the roads—tariff construction— process of development—breaking of the roads— the two Classifications | 5–11 |
| THE SEABOARD AND CENTRAL FREIGHT ASSOCIATION TERRITORY | 1-12 |
| The Rates Necessary to Be Considered | 2-17 |

—John Shand of New York—competition between C. F. A. shippers is sharp—testimony of witnesses for appellees, on whose behalf this brief is filed—comment on the testimony of witnesses for Missouri River ap-

pellants.

| THE ORDER OF THE COMMISSION RESULTS IN A DIS- CRIMINATION IN FACT | |
|--|----|
| The Preference Compelled by the Order to the Seaboard Shipper Violates Sections 2 and 3 of the Act to Regulate Commerce | 16 |
| The Commission Has no Power to Create a Rate Relation Resulting in Undue Discrimination46-5 The Act to Regulate Commerce limits as well as creates the power of the Commission—discrimination is unlawful—Lake Shore Railway Company v. Smith, 173 U. S. 684—R. R. Commission of Texas v. Galveston, 115 S. W. 94—cases under the Interstate Commerce Act in which a discrimination without reason has been held unlawful on similar facts: Bigbee Packet Company v. M. & O. R. Company, 60 Fed. 545. I. C. C. v. A-M Railway Co., 69 Fed. 227, 232; "Aff'd." 168 U. S. 144; Hilton Lbr. Co. case, 9 I. C. C. R. 17-31; Platt case, 7 I. C. C. R. 323; Wight v. U. S., 167 U. S. 512. | 7 |
| Reasons Suggested by Appellants in Support of the Commission's Order | 8 |

based upon the assumption of Legislative power—the so-called "familiar principle" that the through rate should be less than the sum of the intermediate rates—different statements of the Commission commenting upon its order in this case—1908 Annual Report—the bearing of M. & St. L. R. R. Co. v. Minnesota, 186 U. S. 257, upon the "familiar principle;" also Ry. Co. v. Tompkins, 176 U. S. 167—the order shows by its operation that the so-called "principle" was not applied.

Statements of the Report—the ruling of the Circuit Court—statements in the 23d Annual Report of the Commission—legislative power claimed.

Testimony of witnesses for Missouri River appellants—McVann—Hillman—Mack—and Jones. R. R. Commission v. Galveston, 115 S. W. 94; Eau Claire v. Ry. Co., 4 I. C. C. R. 77. The Commission disclaims power to equalize natural advantages by rate structure. I. C. C. v. L. & N., 73 Fed. 409.

MISCELLANEOUS CONTENTIONS IN SUPPORT OF THE ORDER80-83

 Theory that rates here do not discriminate unless business of C. F. A. shipper is destroyed—cross-examination of Evans, Martin and Johnson.

(2) Theory that the Commission under the complaint could only reduce rates from Seaboard, and could not consider discrimination possibly resulting from such reduction.

Cincinnati, etc., Ry. Co. v. I. C. C., 206 U. S. 142.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

THE INTERSTATE COMMERCE COMMISSION,

Appellant

vs.

No. 663.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-PANY ET AL.,

Appellees

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY ET AL., Appellants,

DS.

No. 664.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-PANY ET AL.,

Appellees.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief for Intervening Appellees, A. J. Lindemann and Hoveison Company; Roberts, Johnson and Rand Shoe Company; Whitelaw Brothers; The Simmons Hardware Company; Sprague, Warner & Company; Carson, Pirie, Scott & Company; Kemiweld Canning Company; Parke, Davis & Company; Sherwin-Williams Company.

STATEMENT.

There are two appeals here, one by the Interstate Commerce Commission in case No. 663, and the other, in case No. 664, by the intervening co-defendants, in the Circuit Court, who are shippers and jobbers of the Missouri River cities. Both appeals are from a final decree of the Circuit Court for the Northern District of Illinois, annulling an order of the Interstate Commerce Commission, entered by the Commission June 24, 1908.

GENERAL OUTLINE OF THE CASE.

The original bill was filed to enjoin the operation of the Commission's order of June 24, 1908, reducing the rates on Class Merchandise between the Mississippi and Missouri Rivers on shipments from Seaboard territory. The Commission's order was made on complaint of certain merchants doing business at the Missouri River cities-Kansas City, St. Joseph, Omaha and, by intervention, Sioux City. It was claimed that the rates from the Atlantic Seaboard and other eastern producing territory to the Missouri River cities were unreasonable as compared with rates from the same territory to St. Paul and Minneapolis. It was also charged that the rates from the Seaboard to the Missouri River cities and the rates between the rivers were unreasonable in themselves as part of the haul from the Atlantic Seaboard. Much testimony was taken before the Commission relative to the claim of discrimination in favor of St. Paul and Minneapolis. The Commission, by its report, however, justified the joint through rate from the Seaboard to the Twin Cities as being necessitated by the influence of water competition by the Great Lakes and rail competition by the Canadian and Soo railway systems. The Commission found that the local class rates from the Mississippi River crossing to the Missouri River cities were unreasonably high when used in connection with the rates from the Atlantic Seaboard to the Mississippi River crossings to make the through rate to the Missouri River and beyond. The Commission said:

"This is so because those portions of the through rates which apply between the Mississippi River crossing and the Missouri River cities are too high."

No change was made in the rates between the rivers as applicable to any other than Seaboard business.

The original bill to enjoin the operation of this order was filed by the five railroads, defendants to the complaint before the Commission, whose rails lay not only between the rivers, but also between Chicago and the Twin Cities. Upon the application for a preliminary injunction the six other railways, appellees here, asked and were permitted to join as co-complainants. These roads, with the original complainants, comprise all the roads having rails between the two rivers, except the Wabash Railroad, which the Commission had dismissed as defendant in the original hearing. These last mentioned interveners had, before the exhibition of the bill in the Circuit Court, applied to the Commission for permission to intervene and for a reconsideration.

sideration of the order of June 24, 1908. This application was denied by the Commission.

The merchants of the Missouri River cities followed the case into the Circuit Court by applying for and obtaining leave to become co-defendants; and they have perfected their separate appeal to this court in case No. 664.

Various merchants and jobbers of the territory known as the Central Freight Association territory, lying between the Seaboard territory and the Mississippi River, became, under leave of court, co-complainants, contending that they were injuriously affected by the Commission's order. It is on behalf of these appellees that this brief is filed and presented to the court.

These intervening appellees, merchants, as before stated, of the territory between the Seaboard and the Mississippi River, contend that the Commission's order of June 24, 1908, is contrary to law, and that the decree below be sustained for the following reasons:

- (a) The order is in violation of Section 2 of the Act to Regulate Commerce, in that the order compels a greater charge for a like and contemporaneous service in the transportation of a like kind of a traffic under substantially similar circumstances and conditions rendered to the appellee shippers than is charged to their competitors in the Seaboard territory and on the Missouri River.
- (b) The order is in contravention of Section 3 of the Act to Regulate Commerce, in that it gives an undue and unreasonable preference to merchants

and shippers in the Seaboard territory and on the Missouri River, to the disadvantage of merchants and shippers in the Central Freight Association territory, and that it thereby subjects the latter shippers to an unreasonable disadvantage.

- (c) The order is beyond the power of the Commission in that it arbitrarily attempts to change long existing commercial conditions, upon which the commercial relations of the various distributing centers of the Seaboard territory, Middle West and West have become established.
- (d) The power of the Commission is limited to the reduction of unreasonable rates or to a change in those which give an undue preference or advantage. The rates sought to be reduced by the Commission are not shown to be unreasonable in themselves and give no undue or unreasonable preference or advantage.
- (e) The order is void in being an attempt at legislation on the subject of a general adjustment of the relationship of rates.

L

THE RAILWAY SYSTEMS BETWEEN THE ATLANTIC SEA-BOARD AND THE MISSOURI RIVER.

From the Seaboard to the Mississippi River the through rate is controlled by the short line from the Seaboard to St. Louis. From the Seaboard to St. Louis are the rails of three direct systems—the Pennsylvania, the New York Central and the Baltimore & Ohio. The New York Central Lines, the

Pennsylvania, the Baltimore & Ohio and the Erie also have direct lines from the Seaboard territory to Chicago. The eastern lines stop at St. Louis and at Chicago. Beginning at St. Louis and running westward to the Missouri River are the systems of the Missouri Pacific, the St. Louis & San Francisco and the Missouri, Kansas & Texas. Beginning at Chicago and running westward to the Missouri River are the Chicago, Milwaukee & St. Paul: the Chicago & Northwestern; the Chicago Great Western; the Chicago, Rock Island & Pacific; the Chicago, Burlington & Quincy; the Chicago & Alton; the Illinois Central, and the Santa Fe. The railroads between Chicago and the Missouri River points cross the Mississippi at what are known as the Mississippi River crossings. These are points lying between St. Louis on the south and Dubuque on the north, and are the Mississippi crossings described in the order of the Commission in this case.

The essential point here is that there is no through line between the Atlantic Seaboard and the Missouri River. The eastern railroad systems beginning at the Seaboard all terminate at St. Louis or Chicago. The railroads which commence at these cities going westward are wholly separate and independent lines, under different management, with different terminal facilities and systems of operation.

As a matter of history, Chicago and the Mississippi River were the starting points in the construction of the western roads. From the Seaboard began the roads running westward toward Chicago and

the Mississippi Valley. At the time when the country between the Seaboard and the Mississippi River became covered with railroads, these belonged to different systems. One line, the New York Central. ended at Buffalo; a more southerly line of the same system ended at Salamanca, New York; the Pennsylvania lines, at Pittsburg; the Baltimore & Ohio, at Parkersburg, West Virginia. From Buffalo to Cleveland ran an independent line. From Cleveland the rails were laid by a still different company to Chicago. At one time there were perhaps even more minute breaks in the chain of independent lines. Where the systems broke, there the rates broke also; because each road made its local tariff. covering the service over its own line; and, of course, no joint tariff existed then, or does for that matter now, in which the through rate was lower than the sum of the locals, unless because of the compelling force of competition. In time the systems worked into their present form-that is, into direct lines of single systems running from the Seaboard through to Chicago and St. Louis. When the rails from the east to Chicago and St. Louis became unified, the tariffs naturally were extended so as to cover the whole system. The following quotations from the testimony of Mr. Boyd state in his own language the process of development (Rec., 875; Transcript, 426):

"Now, these systems were amalgamated. First the link from Buffalo to Chicago was made one by the Lake Shore. Then other roads followed until we have the systems that are in existence to-day. As these systems were developed the rate was made continuous over the one line on to the end of its rails.

Q. Take the railroads that were built from Chicago and St. Louis west; how were those

rates established?

A. In the same way. They would start from Chicago and build west independent of any other carrier, making rates according to the conditions. As they built on west toward the Missouri River they would meet others and they would cross and their distance tariffs would be more or less affected by the short line. As they would get to the Missouri River they would terminate and there, as is always the case in the construction of railroads, develop a distributing point. The lines beginning at the Missouri River and building west repeated the same process until they got to Denver, and from Denver until they got to Salt Lake, and from Salt Lake until they got to the Pacific Coast. St. Paul is the same way. A number of these lines there are combinations of various smaller locals.

Q. Then these railroads made their rates on their lines from their initial point to the ter-

minus?

A. Yes, sir.

Q. And the new line at the Missouri River made the rate from its initial point to Denver?

A. Yes, sir.

Q. And the line beginning at Denver and going to Salt Lake made its rate to Salt Lake?

A. Yes.

Q. That resulted in what we term the breaking of these rates?

A. Yes, sir.

Q. What was the commercial effect of that condition of affairs?

A. The development of what are known now as the larger commercial interior centers.

Q. How was the commercial development of these cities based upon and related to this breaking of the rates which you have mentioned? A. The fact that first at the points where the rates broke was found a converging of the greatest number of lines from the inbound and the greatest number of lines outbound, it offered an opportunity to bring in the traffic or to distribute the traffic. It naturally followed that wherever these facilities existed to the greatest extent the merchants took advantage of the situation and they have built up their business on that theory.

Q. How did the breaking of the rates at the Missouri River cities, as an illustration, enter into the development of the business of those cities in respect to their ability to compete with

the great merchants of the Seaboard?

A. The item of transportation is a fixed item of cost in the merchandizing of any class of goods. That is axiomatic. You cannot get away from it. If that item is such that because a shipment stops at some intermediate point in the line of transit and is then rehandled, it is greater than if it were shipped through to the consumer direct, the man at the intermediate point must absorb that burden, and sometimes and very frequently on goods that are sold at close margin it practically puts him out. Others can get along and absorb it, but it reduces their profits and injures them to that extent."

Those quotations point also to the result of the conditions under which, in the growth of the country and the growth of the railroad systems, railroads terminated at some particular point and other distant roads took up the work of transportation from that point on. The result has been the creation of distributing centers, with the growth of which the breaking of the rates became a necessity, and has been a principal cause of their commercial development.

As said before, all the railroads which have been

described as terminating from the east at Chicago and St. Louis and the others beginning at Chicago and St. Louis and running westward are wholly distinct in their management, ownership, control and operation. They are absolutely distinct from each other in everything connected with the movement of freight. They use wholly different treminal facilities. Indeed, the only connection between these railroads is the physical connection of their rails, so that goods may be transferred by rail from the distributing yards of the eastern roads at St. Louis and Chicago to the receiving yards and out-freight houses of the western roads at the same cities.

Perhaps the most marked difference between the western and eastern roads lies in their different classifications of freight. The eastern roads use what is known as the Official Classification, dividing the articles of freight, classified into six classes. The Western Classification obtains west of Chicago and the Mississippi River. In this classification there are five numbered and five lettered classesten in all. Those affected by the order of this Commission in this case are classed as one to five of the Western Classification, which corresponds roughly to classes one to five of the Eastern or Official Classification. The articles classified are often not found in the same classes in the two classifica-The Official Classification is generally lower in its rating than the Western. The difference in the classification made it impossible, even if the necessity had arisen, for joint rates to be made between the eastern and western roads. To St. Louis there were three direct systems from the Seaboard. all using the Official Classification. Hence there was no clash. To the upper Mississippi River crossings, via Chicago, both classifications would have to be used on a joint rate. Here the joint rate was necessary because the lower direct rate to St. Louis was a rate to the Mississippi River on business going beyond, which the roads running in and out of Chicago had to meet in order to share in the business.

As a result the western roads gave up their classification between Chicago and the Mississippi River crossings, and the Official Classification is used from the Seaboard to the Mississippi River on all business via Chicago destined to the Missouri River points and beyond. The rate to the Mississippi on Missouri River business was made the same via Chicago as on the short line to St. Louis.

THE SEABOARD AND THE CENTRAL FREIGHT ASSOCIA-TION TERRITORY.

The geographical extent of the Atlantic Seaboard territory as used in this case includes all that territory east of a line drawn through Suspension Bridge, Buffalo and Salamanca, New York; Pittsburg, Pennsylvania, and Parkersburg, West Virginia; thence to the Potomac River and along the Potomac River to the Atlantic Ocean. (Kallman, Rec., 474; Tran., 230.)

The territory known as that of the Central Freight Association lies west of Buffalo and Pittsburg, north of the Ohio River, east of the Mississippi River and Chicago, and south of the Great Lakes. The territory west of Chicago and Mississippi points to the Missouri River is known as the Western Trunk Line territory. In this case we are concerned with the rate between the Mississippi and Missouri Rivers as used to make up the total rate from the Seaboard and from the Central Freight Association territories t_{ℓ} the Missouri River cities and points beyond.

THE RATES NECESSARY TO BE CONSIDERED.

As the railroads east and west of the Mississippi River and Chicago were built as separate and wholly independent lines, so the rates have been made wholly independent of each other—the eastern rates are independent of the western rates and the western rates are independent of the eastern. On Seaboard and Central Freight Association traffic destined for the Missouri River there are applicable only two local rates; that is, on such shipments the total is made up of the sum of the rates in and out of the Mississippi River points.

At the time when the railroads were built, Chicago and St. Louis occupied positions as commercial centers because of their natural advantages of water navigation. Then, as the railroads were built west of Chicago and St. Louis they established their own tariffs upon their own classification without the slightest reference to the rates from the Seaboard.

The rates on the Western lines from the Seaboard to points in the Central Freight Association territory, including St. Louis and Chicago, are based upon the rate from New York to Chicago. This, on first class, is 75 cents per hundred pounds. The

rates to the other points in Central Freight Association territory are based upon their approximate mileage percentage of this rate, taking the Chicago rate as 100. The rate from New York to St. Louis is 87 cents, which is 1.16 per cent. of the New York-Chicago first-class rate.

Excepting in the case of the rates between the Mississippi and the Missouri Rivers, we will only give the rate on first-class freight. This is sufficient for the purposes of this case and tends to avoid confusion.

The rates between the rivers in the five classes of merchandise, which rates are reduced by the Commission's order, are as follows:

These rates are published in Joint Freight Tariff, W. T. L., No. 215, I. C. C. No. 741, establishing rates between Chicago, the Mississippi River gateways and the Missouri River cities. These rates between the rivers are applicable to all business, without any regard to its origin. As the tariff shows, the rates are applicable to all business to the Missouri River cities which originates at, is destined to or passes through the gateways on the Mississippi River and Chicago. As will be shown by quotations from the undisputed testimony, these rates have no distingishing characteristic as local or through rates. They are simpy the rates between the points mentioned applicable to all business.

The local rates from Chicago to the Mississippi River crossings vary from 35 cents to 43 cents per hundred pounds, first class. The rate from Chicago to any of the Missouri River cities is 80 cents, first class.

The rates between the Mississippi and Missouri Rivers, which have been noted as 60 cents on firstclass and proportionately less on the other four classes, are not intra-state rates. It is true that this rate as a merely Missouri rate has been fixed at 60 cents first-class as the maximum. rate is applicable to hauls between Missouri and Iowa; as, for instance, to the haul from St. Louis to Council Bluffs: between Missouri and Nebraska. as in the case of the haul between St. Louis and Omaha; between Illinois and Missouri, Iowa and Nebraska, as in the haul from Eeast St. Louis, Quincy, East Burlington and Rock Island to Kansas City, Council Bluffs and Omaha; between Iowa and Missouri or Nebraska, as in the case of shipments from Dubuque, Davenport, Burlington or Keokuk to Kansas City, St. Joseph, Omaha or Sioux City. This statement effectually does away with the statement of counsel for the Missouri River jobbers (Brief, Point 3, p. 16), that "these (rates) are entirely within the States of Iowa and Missouri, and are, therefore, governed by the legislatures of those states." It is true that some of the hauls between the rivers are wholly within Iowa or Missouri, but the reduction of any rate between the rivers, whether intra-state by a state commission or interstate by the Interstate Commerce Commission, necessarily reduces the rates on all the other hauls to such railways as intend to compete for the business.

On business from the Seaboard to the Missouri River cities via Chicago the rate to the Mississippi River crossings, as already shown, is the same as the rate to St. Louis—namely, 87 cents.

J. M. Johnson, vice-president of the Missouri Pacific Railroad, gives an account of the manner in which the rate to the Mississippi crossings from the Seaboard via Chicago was made (Rec., 319; Trans., 157):

"Commercial conditions were taken into consideration very largely in making these rates, and Chicago was established differentially higher than St. Louis. The rate from New York to Chicago plus the rate from Chicago to the Missouri River was not at all times the same as the combination from the Seaboard to St. Louis plus the rate from St. Louis to the Missouri River, and in order that all roads leading from Chicago might participate in the through traffic from the Seaboard to the Missouri River, both via Chicago and via Peoria, it was necessary to establish a line up to which both could work to and work from. Now, the rates from the Missouri River all the way from St. Louis to Dubuque to the Missouri River were the · * I am speaking of the rates themselves; the local rates from the Mississippi River to the Missouri River are the same from St. Louis to Dubuque, so there you had a factor which was the same all the way to use in making a through rate. The matter was taken up by what we call the eastern lines, and they, in connection with the western roads operating between Chicago and the Mississippi River, brought their rates up to the Mississippi River on certain traffic; that is, traffic destined west; they brought their rates up to the Mississippi River, which, joined to the rates west of the Mississippi River, made the same through rate from the Atlantic Seaboard through via Chicago, Peoria and St. Louis. * * That was absolutely necessary in order to enable all roads operating through Chicago, through Peoria and now, in fact, through Milwaukee, across the lake, to participate in the Seaboard-Missouri River traffic."

Certain other rates between Chicago and the Missouri River points on business going to

- (a) Montana common points;
- (b) Pacific Coast points;
- (c) Oklahoma points;
- (d) Texas common points;

were considered by the Commission. Those rates are all less than the rate between the Mississippi and Missouri Rivers in controversy in this case. They were urged upon the Commission by the Missouri River complainants as comparisons by which to judge the unreasonableness, per se, of the 60-cent rate on first-class merchandise. All these rates are affected by outside competition. The rates between the rivers on business to Montana common points are regulated by the rate through the Twin Cities, which is affected by the water competition through the Great Lakes. The inter-river rate, as applied to Pacific Coast freight, is affected by water competition around Cape Horn and by the Central American routes. So, the inter-river rate, applied to through business destined to Oklahoma and Texas common points, is regulated by water competition by the Gulf of Mexico. These lower rates were upheld by the report of the Commission in this case. They have no application here as a criterion as to the reduction of the inter-river rates as applied solely to Atlantic Seaboard business destined to Missouri River points.

The rates in question in this case are the rates on the five classes of merchandise between the Mississippi and the Missouri Rivers on Seaboard or C. F. A. business. These rates the Commission changed by a reduction of about 15 per cent.. but to apply solely on business originating at the Atlantic Seaboard. These rates are the same on all the roads running between the Mississippi and the Missouri Rivers. Although the distance may vary, the equality is due to the inevitable compulsion of the competition by the shortest route. These rates between the rivers apply on all traffic, whether originating at the Mississippi River or in Central Freight Association Territory or at the Atlantic Seaboard, provided the consignment is destined for the Missouri River cites, or for any other Western territory beyond the Missouri River cities; except that which is reached by some cheaper form of carriagenamely, territory reached on the North through the Twin City gateways by the Great Lakes and the Canadian roads, or, as in the case of Pacific Coast territory, by the water route around the Cape or via Panama, or the Southwest, which may be reached by the cheaper water route from the Atlantic Seaboard to the Gulf of Mexico.

THE RATES BETWEEN THE RIVERS ARE SEPARATELY ESTABLISHED RATES, APPLICABLE TO ALL BUSINESS DESTINED TO THE MISSOURI RIVER CITIES OR POINTS BEYOND, IRRESPECTIVE OF THE POINT OF ORIGINAL SHIPMENT.

The Western Trunk Line Committee joint through freight tariff, W. T. L. No. 215, I. C. C.

No. 471, already referred to (Rec., 2337), shows these rates as being applicable to all business whatsoever between any of the Mississippi River gateways and the Missouri River cities to all business coming from or through the Mississippi River gateways and to the Missouri River cities.

The character of the rates between the rivers is given in the testimony of Vice-President Johnson (Rec., 323; Trans., 159):

"They (the rates between the Mississippi River crossings and the Missouri River cities) are rates which have been established from time to time by the Western roads as their own local rates. They are not parts of through rates nor have they any relation whatever to rates east of them. They apply on all traffic originating at the Mississippi River destined to the Missouri River, and they apply on all traffic through those points to the Mississippi River.

* * They apply, as I said before, on all business originated at Mississippi River points, and also on all business originating in seaport territory, and I might add in Central Freight Association territory."

Q. That is territory intermediate between the Atlantic Seaboard territory and Chicago

and St. Louis?

Again, the same witness said (Rec., 327; Trans., 160):

"Q. Take the class rate between the Mississippi crossings and the Missouri River; they are not joint rates, you testified?

A No.

Q. And they are not separately established rates to be applied to through business, as you testify?

A. No, they are local rates."

So, Frank P. Eyman, assistant general freight agent of the Chicago & Northwestern Railway, a witness for the complainants, stated (Rec., 425; Trans., 207-8):

"Q. Now these rates between the rivers on class merchandise are not joint rates, or rates to be applied to through business, but are rates

applied on all traffic?

A. They are applied on through business from the Seaboard and from all territory East, but they are also applied on the local business which originates at the Mississippi River crossings to the Missouri River.

Q. In other words, they are not separately established to be applied to through business.

they are established for all business?

A. Yes, sir; established for all business."

It has been necessary, from the shipper's standpoint, to bring out all the facts connected with the rates between the rivers in order the more easily to show that by the order of the Commission the merchants of the Central Freight Association territory, on behalf of whom this argument is made, and others who stand in the same position as they do, are forced to pay a greater charge than is paid by the Seaboard or Missouri River shipper for an identical service, in contravention of both Sections 2 and 3 of the Act to Regulate Commerce.

THE TRANSPORTATION SERVICE BETWEEN THE MISSISSIVPI AND MISSOURI RIVERS.

Eleven railroad companies who were complainants and intervening complainants in the Circuit Court come here as appellees. All these companies have rails between the Mississippi River and the Missouri River. Some of them, as before stated,

begin at Chicago and the others at St. Louis. None begins further east than Chicago. The rates of all are identical between the rivers, irrespective of the point of origin of the shipment; that is to say, whether the shipment originates on the Mississippi River, or east of the river in Central Freight Association territory, or in the Atlantic Seaboard territory.

No line originating in Seaboard territory runs between the Mississippi and Missouri Rivers.

Chicago and St. Louis are the breaking points of all the railroad systems. At St. Louis and Chicago begins the haul at the eastern termini of the western lines. At St. Louis and the upper Mississippi River crossings from St. Louis to Dubuque begins the haul between the rivers.

As we have shown, the rate from the Seaboard to St. Louis by the direct lines thither is, on business via Chicago destined to the Missouri River and beyond, projected out as far as the Mississippi River. In other words, the rate to the Mississippi River via Chicago on business destined beyond the Mississippi River is equalized with the St. Louis rate. The terminal work which is done in case of traffic via St. Louis on the Mississippi River at St. Louis is, in the case of traffic to the Missouri River via Chicago, done not at the Mississippi River, but at Chicago, where the eastern connecting roads end and the western roads begin.

Mr. F. P. Eyman, to whose testimony reference has already been made, said (Rec., 434; Trans., 212):

"There is a transfer at the Mississippi River, but the Missouri River business, so far as our own line is concerned, is transferred at Chicago because there is where we have the facilities for taking care of the business. Now, Chicago is the natural breaking point for the Northwestern Road, and if it was not for a condition that is fixed for us at St. Louis, that is where our rates would break, at Chicago, not at the Mississippi River at all. But we are forced by reason of the competition, just as I stated before. That is why we depart from the principal of making Chicago the breaking point. I think that Chicago ought to be the breaking point. I think Chicago ought to be the basing point, but my thinking so does not make it so, because the eastern lines have extended their roads up to the Mississippi River at St. Louis, and that makes necessary the extending of the through rate, the through joint rate, in connection with the eastern lines up to the upper Mississippi River crossings in connection with our line, because we do not reach St. Louis."

The service rendered between the rivers on business destined to the Missouri River, as a matter of transportation, is precisely the same for all shipments that come from territory on or east of the Mississippi River, no matter where originating. There is a difference, as will be later shown, between the cost of terminal expense upon traffic originating locally and that which is delivered from eastern connecting lines; the traffic originating locally costing less to handle at the terminals than the traffic coming from eastern points. So far as the transportation between the rivers is concerned it makes no difference whether the traffic comes from Cincinnati, Chicago, Cleveland, St. Louis, Toledo,

Detroit, Milwaukee, Buffalo or New York. Precisely the same transportation service is rendered for the 60-cent rate on first class merchandise by the appellee carriers between the rivers. If the shipment comes from Erie the service between the rivers is precisely the same as if the shipment originated at Buffalo. This is invariably true. The same train from St. Louis to Kansas City or St. Joseph or to any other Missouri River city may contain cars in some of which are goods from a point in Central Freight Association territory, and in others goods from points on the Seaboard. service between the rivers given to these shipments by the western roads is utterly undistinguishable. More than that, the same car may contain different shipments for a Missouri River point originating at various points east of the Mississippi River in both Seaboard and Central Freight Association Herritory. The service rendered here by the western roads is identical. No distinction whatever is made by the railroads in their service between the two rivers, dependent upon the place of origin of the shipment. Every article of freight which comes to a western road at Chicago or St. Louis destined for the Missouri River stands on the same footing as any other article of freight delivered to the western road by its eastern connection and bound for the same destination.

It is plain that there is no place here for any distinction on the part of the western railways in their rates based upon any distinction in the point of origin of the traffic.

So far as concerns the transportation service be-

tween the rivers, that service is conducted as a transportation service under,—not substantially,—but precisely similar circumstances and conditions. This fact, that the service between the rivers is the same, is a fact not only true of itself, but which any one at a glance can see must of necessity be true.

Mr. McPherson, assistant to the general manager of the Missouri Pacific, in charge of transportation, a witness for the appellee, testified on this point (Rec., 567; Trans., 270):

"Q. Is there any difference in the cost or expense to your road of hauling through cars between St. Louis and Missouri River points, arising from the fact that the freight contained in the car originates at one point on the east rather than another?

"A. The expense of handling the car from St. Louis to Kansas City would be relatively the same, provided the contents, the average loading, was the same.

"Q. And the cost of hauling and everything else in handling the car between St. Louis and Kansas City would be the same, would it not? "A. Yes."

The only difference between two shipments, one originating in the Seaboard territory and one in the Central Freight Association territory, is that a shipment from, say New York, takes a longer haul to St. Louis or other Mississippi point than a shipment from, say Pittsburg. The fact that the length of the haul on the eastern road varies might be a good reason for a difference in the rates between the point of origin and the Mississippi River on the same line,—the eastern line; but this fact is no rea-

son whatever for any difference in the rates on the new line of road between the rivers, for the service there is, in all cases, as shown, identical. In fact, the difference in the length of the haul from the Seaboard on the one hand, or from the Central Freight Association territory on the other, to the Mississippi River, is covered by the difference in the rate charged by the eastern carriers up to the Mississippi River.

(See testimony of McVann, Rec., 975-6-7; Trans., 474-5; Deft. Intervenors' Exhibit 1; Rec., 984-5; Trans., 478-9.)

In the case of the longer haul from the Seaboard to the Mississippi River, the service rendered by the eastern railroad may cost less per ton mile than the service rendered in the shorter haul from points in the Central Freight Association territory to the Mississippi River; but whether the haul be long or short to the Mississippi River, the haul between the Missisppi River and the Missouri River is one and the same. From the standpoint, either of the shipper or of the western railroad company, the haul is the same, the service is the same, and the rate should be the same.

COMPARISON OF TERMINAL EXPENSE IN THE HAND-LING BY THE WESTERN ROADS OF FREIGHT ORIGINAT-ING LOCALLY, THAT IS, AT THE EASTERN TERMINUS OF THE WESTERN ROADS, AND OF FREIGHT RECEIVED FROM EASTERN CONNECTING LINES.

The testimony shows that when freight is consigned from the Seaboard (or from any point upon the eastern railway connection) to Missouri River

points, and is transferred from the eastern road to the western road, either at St. Louis or at Chicago, it costs the western road nearly twice as much to handle such freight into its cars at its eastern terminus as it does to take up and load a corresponding amount of freight originating locally.

(Testimony of Frank L. Johnson, Rec., 274; Trans., 135, et seq.; McPherson, Rec., 556; Trans., 265; J. E. Taussig, Rec., 602; Trans., 287.)

The freight from Seaboard or Central Freight Association points to the Missouri River via Chicago is almost entirely carried at less than car load rates. There is almost no through car business.

Mr. Frank L. Johnson, divisional superintendent at Chicago Burlington system (Rec., 281; Trans., 139), stated that the proportion in the five classes affected by the order, of through cars as against cars in which the bulk was broken on transfer from the eastern to western roads, is "so small that it is hardly conceivable." He stated that of the total freight, at an outside figure, 2 per cent. or 3 per cent. would represent the amount not rehandled in Chicago.

Where the bulk of freight in the car is broken at Chicago, most of the freight is delivered by the eastern connection to the western line in a car of unassorted freight at the western line's receiving yard. Thence it is hauled to the western line's out-freight house, a distance of some miles, at the western line's expense. The car is emptied, the goods sorted and left upon the freight house floor, ready to be loaded into the western line's cars. The

car which brought the freight from the connecting line must be returned, subject to a per diem charge. Every part of this operation is an additional expense.

On the other hand, where the shipment originates in Chicago, the haul to the out-freight house of the western line is made by the shipper's teams at the shipper's cost. The goods are even unloaded by the shipper's teamsters or his assistants upon the truck on the floor of the out-freight house; and there finally begins the expense to the western line. It costs hardly half as much to load a car with local shipments as to transfer and load shipments coming from an eastern connection.

In St. Louis the local shipper does just what the local shipper in Chicago does. He hauls his goods to the out-freight house, and here he delivers them to the railroad, and its only service is to load the goods from the floor of its own out-freight house into the out-bound car.

On the other hand, for goods coming from connecting eastern lines, two methods of transfer are in use. In both the goods must be hauled across the Mississippi River from East St. Louis to the western railroad's out-freight house, in St. Louis proper. This is done wholly at the expense of the western road. The haul may be by car, in which case the western road has to pay and absorb a charge of two cents a hundred pounds, with a certain minimum both on contents of car and weight of shipment. The second method is to haul the goods by team from East St. Louis to the out-freight house in St. Louis

In this case the charge is five cents per hundred pounds, with a certain minimum per shipment.

The testimony as to the greater expense in handling freight received from the eastern connection than freight received locally, as an initial matter in the haul, in the making up of the cars and trains, is wholly uncontradicted. The testimony on this subject is very full, and goes into all the details of the terminal service.

Even where the transfer is made from the eastern to the western line by means of through cars, from the Seaboard to the Missouri River, the expense of carriage is greater to the western road than in the case of cars loaded by the western road itself. The reason of this lies in the fact that the through car carries a very much smaller load than the car originating at the western line's own terminus, and the western line is also burdened in such case with not only the per diem payable to the eastern road for the car service, but with the expense of an empty haul back from place of designation to the western road's terminus. However, as stated before, only a very small percentage of the business is done from the Seaboard to the Missouri River in through cars.

The bearing of this testimony is clear: The Commission's order prescribes that the rate between the rivers shall be less on freight coming from the Seaboard territory than on freight coming either from Central Freight Association territory or arising locally.

This testimony shows that if any distinction should be made it should be drawn in favor of a lower rate for shipments originating at the termini of the western roads. It serves also to show that the case of two connecting lines, where a transfer of freight is made from one to the other, gives no occasion for the application of any rule calling for a lower proportional rate for a long than for a short haul.

This testimony as to the expenses of the terminal service of the western railways is a complete answer, if any were needed, to the statement of McVann (Rec., 1006; Trans., 488), that the rate for a long distance haul as a general rule is less than the sums of any two rates within that haul, particularly where that long distance haul is participated in by more than one railroad. This will, however, be taken up later in this brief.

What has been said in regard to the terminal expenses at St. Louis and Chicago, and the evidence touching on those points has, of course, no bearing on any question arising between the shippers of the Central Freight Association territory east of the Mississippi River and Chicago, on the one hand, and the shippers of the Atlantic Seaboard, on the other. On freight originating anywhere on the eastern railroads there is no distinction whatever in the terminal service and expenses of the western road, any more than there is in the transportation between the Rivers.

THERE IS AN ACTIVE COMPETITION FOR THE MISSOURI RIVER TRADE BETWEEN SHIPPERS AND JOBBERS IN ALL TERRITORY EAST OF THE MISSISSIPPI RIVER.

In the past generation the jobbing and manufacturing industries of the cities in the Central Freight Association territory have, according to the evidence introduced in the Circuit Court, greatly increased in comparison with similar interests of the Seaboard cities. These industries are connected with the sale and production of most of the articles coming within the five classes affected by the Commission's order. This comparatively greater increase is due to the comparatively greater increase in the population of the Middle West, and the growth of the great mercantile houses in Chicago, St. Louis and other Mid-These houses distribute merchandle West cities. dise throughout the territories directly tributary to them; and in the process of their growth the eastern houses have become gradually less and less able to compete with the western jobbers and manufactur-This has been due to certain natural advantages of which the western houses have been quick to avail themselves. These advantages are: nearness of the jobber or the manufacturer, to the purchaser of his goods; the preference of the purchaser for a market with the personnel of which he is more familiar than with the dealers in the eastern cities; the greater rapidity, owing to proximity, with which orders can be executed. It is cheaper and in every way more convenient to deal with a nearer than with a more distant market. In some cases, as, for example, in the boot and shoe trade, one natural advantage lies in the nearness of the western manufacturer to the supply of his raw material. This is shown by the testimony of Seaboard merchants, who were introduced as witnesses on behalf of the original Missouri River complainants.

In respect of the boot and shoe business, Mr.

Charles H. Jones, a Boston shoe manufacturer, testified (Rec., 1315-6; Trans., 645):

"Q. I want to ask you to state in a general way what advantage such a house as that of Roberts, Johnson & Rand Shoe Company has over your house, or like houses in New England, in the sale of goods west of the Missouri River, and you may state in your own way the

extent of that advantage?

A. They have at the present time every conceivable advantage, except perhaps the superiority in the skill of the New England shoemaker. Except that they have every advantage.

* * They have the advantage in nearness to the supply of raw material. They have the advantage in vicinity to the market where the goods are used, consumed. They have the advantage of more liberal laws in regard to the employment of labor. They have the advantage of a lower scale of wages in their manufacturing establishments; they have the advantage of unlimited nerve, and that I suppose is a natural advantage that we cannot particularly criticize them for.

Q. Do they not have the advantage of the freight rate, say from the Seaboard out to St.

Louis?

A. They have an advantage in freight rate in proportion to the distance that their raw material comes as compared with ours, and also the fact that our finished product must pay the freight clear to its destination, and they are practically at its destination when they start."

Again, the same witness (Rec., 1344; Trans., 658):

"We formerly had eighteen or twenty firstclass jobbing houses in the City of Boston jobbing shoes in that territory (Missouri River cities). To-day there is not one, because the advantage in traveling expense and the nearness to the market, and all those things, are so strong in favor of St. Louis and Chicago that the eastern men could rat compete, and they have gone out of business.

Mr. John Shand, a witness for the Missouri River intervenors, who represented a wholesale hardware jobbing firm of New York City, said on cross-examination (Rec., 1309; Trans., 642), that the competition in the west was too strong for the eastern concerns; that the western concerns were just as active. and were larger in proportion,-ten or twenty times larger than the concern he represented. This size of the western houses, and their ability to do business on a big scale, the witness said, gave them the advantage that they could buy enormous quantities and get a reduction in price, where the eastern houses, buying in smaller quantities, naturally would have to pay more. The witness continued:

"Q. Those two advantages, the advantage of nearness from which these two or three other things come, and the advantage of purchasing in big lots are the principal differences which make it impossible for you to compete out there, are they not?

A. In my mind they are, from our experience. We even went so far as to pay the freight in order to get the business.

Q. Yet these elements were too strong

against you? A. Those were the two important ones. It shows, to my mind, that the freight will not help our business."

Explaining why the New York jobber could not do business in the Missouri River territory, even with the reduction which the Commission's order of June 24, 1908, gave in his favor, the same witness said (Rec., 1293; Trans., 634):

"Of course there are a number of reasons. One is towns having a population of fifteen thousand or more are able to-day to support their own jobbers, and dealers prefer to do business with people that they know. Further, if they have to go a distance of a hundred miles or more it means a big loss of time in shipping goods. The freight rate is not always considered. * *

We also know of cases where the western jobbers have come to the eastern cities, and tried to do business, but they have been up against the same proposition that we eastern jobbers have. It has not been successful."

The advantages to houses in the shoe business in St. Louis and Chicago are also outlined by Mr. Jones (Rec., 1314; Trans., 644):

"Although Boston still claims to be the largest leather market in the world, it is not the cheapest. Leather is sold to-day cheaper in Chicago than in Boston, on account of the nearness of Chicago to the tanneries. * * St. Louis is nearer Chicago than Boston and the rate from St. Louis to Chicago is cheaper than the rate from Chicago to Boston, and consequently St. Louis has an advantage in the price of leather over Boston or any New England points."

The testimony is ample to show the extent and sharpness of the competition for the ever growing trade of the west between the different localities and between shippers in the same lines of business. The struggle in this litigation to obtain for the Missouri River cities and for the Seaboard territory an exclusive advantage in the class rates between the rivers is in itself proof both of the rivalry for the trade and the effectiveness of the reduction as against intermediate territory.

As to the keenness of the competition, several wit-

nesses testified representing the appellee shippers, on whose behalf this brief is filed. Other shippers not parties but with a similar interest voluntarily appeared and testified to the same effect.

Henry Kirk White, Jr. (Trans., 237), represented the Kemiweld Can Company of Detroit; John L. Evans (Trans., 253) the Sherwin-Williams Company of Cleveland; George W. Simmons (Trans., 300), the Simmons Hardware Company of St. Louis; Robert H. Whitelaw (Trans., 312) the firm of Whitelaw Brothers of St. Louis; Jackson Johnson (Trans., 322), the Roberts, Johnson & Rand Shoe Company of St. Louis; Arthur Hawxhurst (Trans., 350), for Marshall Field & Co. of Chicago; Albert G. Jones (Trans., 378), for Franklin MacVeagh & Company, Chicago; and Louis B. Boswell (Trans., 394) as Commissioner of the Quincy Freight Bureau, on behalf of the general interests of the merchants of that locality.

Mr. White (Trans., 237) testified that the Kemiweld Can Company was engaged in the manufacture of fibre cans at Detroit; that it made cans on a very close margin of profit (Trans., 238), and had to rely on the volume of business done. He stated, in substance:

"The relative rates to the Missouri River cities obtaining from Detroit, as compared with the rates from my principal competitors in the Atlantic Seaboard territory, is certainly a factor in my business. That relation of rates has existed for some time, and on it my business was established, and has developed. If the order of the Commission went into effect, and the shippers in the Atlantic Seaboard territory, my competitors, were to have their goods hauled

between the Mississippi and the Missouri Rivers, at a lower rate than was charged me, it would mean in most cases a positive loss of business to me." (Rec., 501; Trans., 237.)

"Very often two cents a thousand will make or lose a contract. That might mean two or three dollars a car, even, and although it seems very small, yet any little fluctuation there means lots (loss) of business, if it goes against us."

He further testified that the factories of his principal competitors were located in Atlantic Seaboard territory. (Rec., 500; Trans., 237.)

Speaking of the sharpness of the competition, this witness said:

"Q. How much business do your competitors do in the Missouri cities?

A. I do not know that.

Q. Do you know whether they have done any

business at all there?

A. I know this, that whenever I attempt to get a contract they are all around me like bees and it is a case of arithmetic to get it, that is all." (Rec., 513; Trans., 244.)

On cross-examination the witness stated that his company shipped thirty million cans a year to Missouri River points, selling them at a little less than \$8 a thousand, and that a thousand cans cost very near this price. (Rec., 510; Trans., 242.)

He further testified (Rec., 512; Trans., 243):

"Q. On a thousand cans which are worth \$8, a reduction of 5 cents would destroy your market in that region?

A. Yes, sir; if the other fellow got the advantage over me of 5 cents I might just as well

quit.

Q. Couldn't you easily reduce your selling price?

A. No, sir; you cannot. It is right down to the quick."

The witness testified that he paid the freight on his raw material into Detroit, and that when goods arrived at the Missouri River, by reason of his payment of the freight into Detroit, he competed at the Missouri River on an even basis with the man from New York who had to pay the rate on the finished material from New York. The witness said (Rec., 529; Trans., 252):

"Q. So when you take your raw material in the east and ship to Detroit, and then ship your finished product to the Missouri River, your freight charges will aggregate what the freight charges are for the New York man?

A. The difference between the raw material

and the finished product is very little.

Q. So that the lower rate that you get from Detroit to the River as compared with the New York man is balanced by the fact that you have to pay the freight on the raw material from New York to Detroit?

A. Yes, sir."

Counsel for the Commission brought out from the witness that the operation of the reduction on his business of thirty million cans with the Missouri cities would cut down a profit of about \$12,000, by \$1,500.

To carry out a theory of the Commission (advanced in cross-examination), which seemed to be that the intermediate shipper was not discriminated against unless his business was totally destroyed, the following questions were put by the counsel for the Commission and the following answers were given:

"Q. What is the reason why you could not cut it (the profit) \$1,500? Do you want to

throw away over \$10,000 profit?

A. If the man from New York, through the benefit of his raw materials can land the stuff in Omaha at the same price that I can, and still get \$1,500 more, why should he get the \$1,500, and why shouldn't I?"

Again, the following took place (Rec., 525; Trans., 249-50):

"Q. You know it is the rule in rate making that the longer the haul the less the rate per ton per mile?

A. Then the little fellow in between might as

well be wiped off the map.

Q. That is his misfortune of location; isn't that true?

A. Yes, in a good many senses of the word."

As showing not only the stress of the competition, but the effect of the reduction in favor of the Seaboard shippers, John L. Evans (Trans., 253) testified as follows:

"Q. Suppose the order of the Interstate Commerce Commission involved in this case should go into effect, and the class rates be reduced for shipments originating at the Atlantic Seaboard, between the two Rivers, what effect would that have upon the business of your com-

pany, at Cleveland and at Kensington?

A. I might explain in this way: Raw material brought into the Seaboard, and shipped west to Chicago and the Mississippi River, is on the basis of fourth class rate. The same conditions are in effect with regard to the manufactured product. Were the manufacturers on the Seaboard allowed the differential of four cents between the Rivers, I can see no other way but that it would actually close the varnish factories west of Buffalo, if such a combina-

tion were strong enough or cared to control the entire output."

The witness further said (Rec., 544; Trans., 259) in regard to the varnish business, that the heaviest competition lay in the Seaboard territory, and that the reduction ordered by the Commission would give those competitors an advantage over his firm and over all his competitors west of Buffalo to the amount of the reduction, and that business would naturally seek the point of greatest advantage.

The same witness testified (Rec., 544; Trans., 260) that with the reduction the eastern manufacturers could fill the territory with their salesmen and get the business until shippers situated as he was could not do business at a profit. As in the case of the witness last quoted, the principal competition lay in the Seaboard, and the sources of raw material were there also.

The existence of the competition, its sharpness, the narrow margin on which business was done, and the effect of the proposed rate reduction between the Rivers to the Seaboard shipper, were brought out in the testimony of George W. Simmons, vice-president and traffic manager of the Simmons Hardware Company, of St. Louis. This company does business to a considerable extent in every part of the country, and more or less all over the world. He said (Rec., 629; Trans., 301):

"Our competition is everywhere we go; in other words, we compete in every territory with the merchants, the jobbers and manufacturers who are located in this territory, as well as those other large centers which extend out largely into all parts of the country as we do." After stating that his company had competition in the Seaboard territory, and that the rate adjustment, by which the railroads transport from the Mississippi River to the Missouri, class articles for the St. Louis jobber at the same rate as for the Seaboard shipper, had been an essential in the development of his business and in that of the business houses generally in St. Louis, he testified (id.):

"Q. Now you may state what effect upon commercial conditions here (St. Louis) would result from the enforcement of the Commission's order in this case to compel the railroads to transport between the Mississippi and the Missouri Rivers all articles taking class rates at a lower rate when the shipment originates at the Atlantic Seaboard than the rate charged generally?

A. I believe it would be distinctly detrimental to the business interests of the firm with which I am associated, and also others doing business in St. Louis, if our competition (competitors) could land their goods at the Missouri River points at a less rate than we could.

Q. You think it would affect the status and the development of the business in this city?

A. I think it would decidedly affect the status.

Q. Do you think it would have a deterrent effect on the development of business here?

A. I think it would."

Robert H. Whitelaw (Trans., 312) is a member of the firm of Whitelaw Brothers, jobbers and commission merchants of St. Louis, dealing in heavy chemicals. His testimony was much to the same effect, namely, that the principal competitors were located all over the Seaboard territory, and that up to the present time his firm had been able to maintain themselves, in this competition. An im-

portant factor, essential to the development of his business, and of other merchants in St. Loius, lay in the adjustment of rates by which shipments could be made by St. Louis merchants to the Missouri River on the same basis that the railroads carried their competitors' like goods between the Rivers. He stated positively that any reduction in the through rate from Seaboard territory to Missouri River common points would be disastrous to the commercial interests of St. Louis. He stated emphatically (Rec., 653; Trans., 313):

"I want to say to you that two cents a hundred in a lot of merchandise that I handle is my profit and I do not always get it. It is merchandise in volume very great but in money value small."

On the effect of the reduction, with the competition so close and sharp, the witness further said (Rec., 661; Trans., 317):

"The effect of this rate adjustment on St. Louis would be very disastrous. The Missouri River jobbers are a very bright lot of men. They do not need any guardian. They are looking out for their end. They are trying in this case to get an unfair and an unjust advantage over the middle territory, the distributing territory and I am entering my protest against it because it is unfair and unjust."

To the same effect is the testimony of Jackson Johnson (Trans., 322), one of the chief officials of the Roberts, Johnson & Rand Shoe Company, of St. Louis. Their competitors are on the Seaboard, in New England, New York and Philadelphia. The witness said that seventy per cent. of their business would be affected by the reduction of rates imposed

by the order of the Commission, as seventy per cent. of the business of St. Louis in shoes is done west of the Mississippi River.

To the same effect, both as to the nature of the competition and the result of the order of the Commission, if enforced, upon the business of the C. F. A. shippers, were other witnesses, Hawxhurst (Trans., 350), of Marshall Field & Company, of Chicago, and Jones (Trans., 378), of Franklin Mac-Veagh & Company, of Chicago.

The way the reduction ordered by the Commission would work on the present situation of rates and of business is graphically put by Boswell, the Commissioner of the Quincy Freight Bureau, of Quincy, Illinois. He said (Rec., 833-4; Trans., 405):

"The New York manufacturer will say to the Missouri River customer, 'we can deliver your freight, or, rather, ship your freight at a cost of 9 cents a hundred less than you can buy from manufacturers on the Mississippi River.' Now, how is that accomplished? The manufacturer at Quincy must bring in the materials necessary for the manufacture of we will say fancy shirts and to pay the rate which I believe is first-class, and that would be 88 cents. He must then ship it to Missouri River and points basing on the Missouri River, which would cost 60 cents; that would be \$1.48. Now, the eastern shipper or manufacturer says to the man on the Missouri River and in that territory 'our rate would be 87 (88) if that is the basis, plus 51, \$1.38 (1.39); now, do you want to save that 9 cents a hundred?' Certainly. Where does the interior manufacturer come in, in this deal? He must pay that freight, mustn't he? He must do that to his cost. He cannot recoup, because he must meet the price of the New York man. By the time he gets it laid down on the Missouri River

it has cost him \$1.48, as against the New York man or the eastern man, \$1.38 (\$1.39)."

Much testimony was introduced on behalf of the appellants, intervenors in this case; that is, the merchants, jobbers and shippers located in the Missouri River cities. On their behalf was also taken the testimony of merchants, shippers and jobbers doing business in New York and Boston. The witnesses from the Missouri River towns testified more or less directly that there was no business done by the eastern merchants in that territory, and that consequently the C. F. A. merchants should not fear competition from eastern merchants there. The eastern merchants all testified that they greatly desired a reduction in rate, and that such reduction would be important in their business. The desire that the Commission's order be made operative was manifest through the testimony both of the Seaboard and Missouri River witnesses.

It was also claimed by witnesses for the appellants that the intervening complainants (appellees here). merchants at Chicago, St. Louis and other points in C. F. A. territory, could not be injured, because they did very little business at the Missouri River. This testimony was directed at particular business houses. In considering the question whether the reduction works an undue discrimination or not, such testimony is of course valueless. But the existence of the competition is stated as strongly by the merchants of the extreme east and the Missouri River as by their opposing witnesses of the C. F. A. territory.

For instance, James B. Campbell, of St. Joseph, Missouri, who is engaged in the wholesale dry goods business, testified (Rec., 1173; Trans., 576):

"We are so situated here that we compete not only with Chicago and St. Louis, but with Minneapolis and St. Paul on the north and with our own people on the Missouri River. Competition is very keen and very sharp. There are a good many lines of goods that we would not change the price on if we had a reduction in the rate of freight. It would, however, enable us as a general proposition to meet the competition in towns like Minneapolis or St. Paul, that had a lower freight rate, and that border on the same territory that we worked. It would put us in a position where we could sell to our customers goods in competition with any other point that entered the same legitimate territory."

THE COMMISSION'S ORDER OF JUNE 24, 1908, REDUCING THE CLASS RATES ON MERCHANDISE TRANSPORTED BETWEEN THE MISSISSIPPI RIVER AND THE MISSOURI RIVER, WHEN SHIPPED FROM THE ATLANTIC SEABOARD AND DESTINED TO MISSOURI POINTS, IS A DISCRIMINATION IN FACT.

The order of the Commission ordered the rail-road companies defendants to the complaint before it, to cease and desist before August 25, 1908, from charging, demanding, collecting or receiving for the transportation of property between the Mississippi River crossings,—East St. Louis to East Dubuque, Illinois, inclusive,—and the Missouri River cities, Kansas City and St. Joseph, Mo., Omaha, Neb., and points taking the sames rates, as parts of the through class rates on through shipments originating at the Atlantic Seaboard points

and destined to said Missouri River cities, or to points taking the same rates, their separately established class rates in effect between said Mississippi River crossings and said Missouri River cities. These rates are:

| Classes | | | | | | | | | | 1 | 2 | 3 | 4 | 5 |
|---------|--|--|--|--|--|--|--|--|----|----|----|----|----|----|
| | | | | | | | | | | - | - | | _ | - |
| Rates | | | | | | | | | .1 | 60 | 45 | 35 | 27 | 22 |

The order then required that the railroads apply to the transportation of property between the Mississippi River crossings and the Missouri River cities, as parts of the through rate on through shipments originating at the Atlantic Seaboard points and destined to the Missouri River cities, class rates per hundred pounds not in excess of the new scale. This scale is as follows:

That there is a discrimination in fact worked by this order of the Commission, reducing the rates between the rivers, goes without saying. A shipper in New York has a rate of 51 cents on first-class per hundred pounds between the Mississippi River and Missouri River. A shipper in Chicago, St. Louis or Cleveland must pay for an identical service 60 cents; the New York shipper therefore has the best of the Central Freight Association shipper to the extent of about 15 per cent. That this is a discrimination was recognized by the opinion of the Circuit Court, delivered by Judge Grosscup, November 7, 1908, on the original application for a preliminary injunction. The Court then said (Rec., 136; Trans. 72):

"There is no doubt but what in the case brought to our attention in this bill there is discrimination. But is that undue or unreasonable within the meaning of the Act?"

This sets forth the exact question to be considered. There is a manifest discrimination. The question now is whether that discrimination is an undue discrimination or works an unreasonable preference in favor of any shipper or locality under the third section of the Act, and also whether the order is in contravention of the second section of the Act, in that it forces the railroads to receive from certain persons a less compensation for the service rendered, namely, the transportation between the rivers, than the railroads must receive from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.

THE PREFERENCE WHICH THE RAILROADS ARE FORCED TO GIVE BETWEEN THE RIVERS TO THE SHIPPER FROM THE SEABOARD TERRITORY ON GOODS DESTINED TO THE MISSOURI RIVER CITIES IS IN CONTRAVENTION OF SECTIONS 2 AND 3 OF THE ACT TO REGULATE COMMERCE.

In contravention of Section 2, a greater charge is made to the Central Freight Association shipper for doing for him a "like and contemporaneous service" in the transportation of his traffic moving between the Mississippi and Missouri Rivers than is made to the shipper from the seaboard territory, "under substantially similar circumstances and conditions."

In contravention of Section 3, the result of the order is that an undue and unreasonable preference or advantage is given to the locality known as the Atlantic Seaboard, over the localities comprised in the Central Freight Association territory, so far as transportation of their traffic between the Mississippi River and Missouri River is concerned.

An undue discrimination is a discrimination between localities, or a preference given to one locality over another, for which no adequate reason can be found.

If there were a difference in the mode of handling the traffic: if the traffic from one section came in a form different from the traffic from the other locality; if the value of the service rendered to the shipper were for conceivable reasons greater in one case than in the other; if the handling of one kind of traffic made for the carrier inconveniences, difficulties or expenses which did not exist in the case of the other traffic; if the shipper from the seaboard had some means of reaching the Missouri River by a shorter route or less expensive mode of transportation than that which alone could be used by the C. F. A. shipper,—then in any of these cases the railroad might, of its own accord, make a distinction in the rates. But no such difference in circumstances and conditions exists here. If there were such a difference, it would still be doubtful whether the Commission could force the railroad to an alteration in the rate.

No suggestion of any rational ground for the preference given by the order is to be found in the testimony. The testimony for the appellees shows that the circumstances and conditions of the transportation between the rivers with reference to shipments from the Seaboard and from intermediate territory are not merely substantially similar, but are identical; except so far as the traffic originating at the eastern terminals of the western lines is handled even more cheaply and easily than the traffic either from the Seaboard or from the other portions of the Central Freight Association territory.

THE COMMISSION HAS NO POWER TO COMPEL THE RAILROADS TO PUT IN FORCE A RATE RELATION WHICH IN ITSELF WORKS AN UNDUE DISCRIMINATION OR UNREASONABLE PREFERENCE. THE ACT CREATING THE COMMISSION FORBIDS ANY SUCH UNDUE OR UNREASONABLE PREJUDICE OR PREFERENCE.

The Act to Regulate Commerce in its prohibition of unreasonable rates, of devices to favor one shipper against another, of undue discrimination, and of unreasonable preference or advantages, is as binding upon the Commission as it is upon the rail-roads.

While the two following cases arose under state laws, both have a direct bearing on the want of power in the Commission or any like body, to put in effect a rate resulting in an unreasonable discrimination.

Tn

Lake Shore Ry. Co v. Smith, 173 U. S. 684. an Act of the Legislature of Michigan provided, as an amendment to the General Railway law of the the state, that 1,000-mile tickets should be kept for sale by all railroad companies in the state at a price

not exceeding 2 cents a mile, which tickets should be non-transferable, except as they might be issued in the name of the family of the purchaser. rate was lower than the maximum scale of rates fixed by the general railroad act of the state, which provided the rate to be charged the general public. Smith sought a writ of mandamus to force the defendant, the railroad company to sell him a mileage ticket under the Act. The writ was granted by the Circuit Court, and this judgment was on appeal sustained by the State Supreme Court. The principal defense of the railroad company considered in the opinion of the Supreme Court is that the Act was a violation of the 14th Amendment, in depriving the railroad company of its property without due process of law, in that the Act worked an undue discrimination between classes of passengers. The Court said, at p. 692:

"The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. * * * If the Legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the Legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative

judgment or caprice may seem proper. What right has the Legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the Company without due process of law? We are convinced that the Legislature cannot thus interfere with conduct of the affairs of corporations."

In

Railroad Commission of Texas, et al., v. Galveston Chamber of Commerce, et al., 115 S. W. Rep., 94 (Court of Civil Appeals of Texas),

the facts were to all purposes the same as in the case at bar. Houston and Galveston are situated at the two ends of the branches of a Y, the junction point being at Algoa, and the leg of the Y extending from Algoa to Brownsville on the Rio Grande. The Texas Railway Commission issued an order under Article 4574 of the Texas Revised Statutes of 1895. which Article, as the Texas Supreme Court said in this case "was modeled after and is substantially the same as the third section of the Act of Congress, known as the 'Interstate Commerce Act.'" The order of the Texas Commission required a higher freight rate to be charged to and from points on the railway connecting Algoa and Brownsville when freight was destined to Galveston than when freight was destined to Houston, although the service rendered from any point on the road from Brownsville to Algoa, to reach either Houston or Galveston, was identical. The branches of the Y from Algoa to

Houston and Galveston were not parts of the same line of road as that from Brownsville to Algoa. The haul of freight on the Brownsville line up to Algoa, or from Algoa to Brownsville, as the destination, is therefore in the Texas case what the transportation of freight between the Mississippi River and Missouri River is in the case at bar. There was an identical service performed by the Brownsville road, whether the freight started from Galveston or Houston or was destined to Galveston or Houston. The Supreme Court of Texas said:

"The trial court evidently held that the rules and orders of the railroad commission requiring a higher freight rate to be charged to and from points on the St. Louis, Brownsville and Mexico Railway to Galveston than to and from Houston constitute an 'unjust discrimination,' as defined in the first clause, and also as defined in the first subdivision of the statute quoted. Of course, it is not, and could not successfully, be contended that the Railroad Commission can nullify these provisions of the statute and authorize railroads to disregard them. Hence it follows that if the Court was correct in either of the conclusions referred to, the judgment must be affirmed. After a careful and extended consideration, we have reached the conclusion that the Court's findings of fact are supported by testimony, and that its conclusion of law that the rules and orders complained of constitute an 'unjust discrimination,' as defined in the first subdivision of Article 4574, is correct. This being the case, the judgment must be affirmed. * *

There are several cases where the facts are similar to those of the case at bar, in this, that an identical service is rendered where no outside competition intervenes to force the railroad in question into the

position of leaving alone the favored business or taking it at a lower rate. In these cases it has been held that the preference was undue and unreasonable. These are:

The Bigbee Packet Co. v. M. & O. R. Co., 60 Fed. 545;

I. C. C. v. Alabama Midland Ry. Co., 69 Fed. 227 at 232 (affirmed 168 U. S. 144 at 166);

Hilton Lumber Co. case, 9 I. C. C. R., 17 at p. 31;

The Platt case 7 I. C. C. R., 323; Wight v. U. S., 167 U. S. 512.

In

Bigbee Packet Company v. Mobile, etc. Co., supra.

cotton was offered the railroad for shipment, at Mobile, to New Orleans. The cotton in question had been previously transported by a packet company operating steamboats from the Town of Demopolis, some distance north of Mobile, by way of the Tombigtree River. The carrier from Mobile to New Orleans charged a higher rate on the cotton which had come from Demopolis by water than on shipments of cotton coming from connecting railroad lines or on cotton which originated locally at Mobile. was done for the purpose of equalizing the carriage to Mobile of the various transportation lines, rail or water. The defendant railroad company claimed that the proposed shipment was not an original shipment from Mobile to New Orleans, but was a shipment from Demopolis through Mobile to New Orleans, and it was urged that the prior transportation by water made a substantial dissimilarity of circumstances and conditions between different shipments. The Court said, p. 547:

"What substantial dissimilarity in circumstances and conditions is there, then, between a shipment of cotton from Mobile to New Orleans by a person who has received the cotton from Tuscaloosa or any other part of Alabama, for illustration, and a shipment of cotton from Mobile to New Orleans by a person who has received it from Demopolis, Ala.? There is a dissimilarity in the circumstance that one lot of cotton came from one point and the other lot from another point. But this is not a substantial dissimilarity, such as is contemplated by the law, and it is not every dissimilarity of circumstance or condition that justifies a dissimi- The circumstances and larity of rates. conditions to be considered are those which bear upon the transportation by the particular carrier, and under which such transportation is con-They must have direct bearing upon the ducted. traffic over the line on which the discrimination The dissimilarity of circumstances and conditions set up by respondent in justification of its claim is not the outcome of competition by water routes or any other competitive railroad line not subject to the Interstate Commerce Act. Respondent's position on this point cannot be sustained. I am unable to see that the circumstance that the cotton in question came from Demopolis to Mobile to be re-shipped thence to New Orleans, has any direct bearing upon the traffic over the respondent's line to New Orleans. I am unable to see how the fact or circumstance that the cotton came from Demopolis can in anyway affect transportation or traffic over respondent's line and connecting lines in New Orleans.

In

Interstate Commerce Commission v. Alabama Midland Ry. Co., 69 Fed. 227, supra, the Board of Trade of Troy, Alabama, complained of defendant railway companies on the ground that rates charged for transportation by the companies and their connecting railroads discriminated against Troy, contrary to the provisions of the Act to Regulate Commerce.

Two of the phases of the alleged discrimination present analogous situations to those in the case at bar. Troy lies 60 miles southeast of Montgomery. On business from points farther north, such as St. Louis or Cincinnati, shipments to Troy pass through The Alabama Midland Railway Montgomery. charged the local rate from Montgomery to Troy on these shipments, and this was complained of. Troy merchants claimed that they should not only have the advantage of the reduced rates between the distant shipping points and Montgomery, but that they were also entitled to reduced rates from Montgomery to Troy; just as in this case the Missouri River cities claim not only the advantage of the low basis of rates between the Seaboard points and the Mississippi River, but that they are entitled to a lower rate between the Rivers than is given to shipments originating in Chicago or St. Louis.

A similar claim was made as to cotton shipped from Troy to New Orleans by way of Montgomery. This rate was made up upon a combination of the so-called local rate from Troy to Montgomery with the through rate from Montgomery to New Orleans. It was claimed by the Troy merchants that on this transportation, although the service was rendered by more than one railroad connecting at Montgomery, they were entitled to a through rate applying

to this business between Troy and Montgomery less than the local rate. The Court said:

"It may be asked, by what right or by what rule shall a common carrier, whose duty it is to serve the public impartially, be required to carry the goods shipped by a Cincinnati merchant via. Montgomery, to his customer at Troy, Ala., for a less rate than is charged upon goods of the same class shipped by a Montgomery merchant to his customer at Troy, Ala.? And does not the contention here that Troy parties are entitled to the same rates per ton per mile from Montgomery to Troy that they get from the shipping points in the northwest to Montgomery invoke a violation of the spirit, if not the letter, of the law itself, and show that such contention cannot be sustained?"

The decision quoted was affirmed by this Court in 168 U. S. 144.

In the case of

Hilton Lumber Co. v. Wilmington & Weldon R. R. Co., supra.

the facts were that the local rates on lumber from Wilmington (N. C.) to Norfolk or Portsmouth, Virginia, added to rates in force from Portsmouth or Norfolk to Philadelphia, Jersey City or Boston, produced lower aggregate charges than the through rates on lumber carried by the connecting defendand railroads from Wilmington direct to Philadelphia, Jersey City and Boston, via. Portsmouth and Norfolk. The railroads attempted to justify this rate situation by saying that there was competition by water, which compelled a low rate from Portsmouth and Norfolk to the northern points. The Commission held that the water competition bore equally upon the business, whether it originated at Wilmington, or at Portsmouth and Norfolk.

The Commission said (p. 37):

"We are also of opinion that in charging a through rate which exceeds the sum of the locals by reason of the fact that the proportion from Portsmouth north exceeds the local from that point, these carriers violate the second section. A car load of lumber shipped north from Wilmington is carried by the Seaboard Company to Portsmouth, and there delivered to the line leading north. That line exacts from the Wilmington dealer a greater charge than would be imposed if the lumber originated at Portsmouth or Norfolk, for the reason that it comes from Wilmington. The circumstances and conditions applying on the transportation from Portsmouth, Norfolk or vicinity, are substantially similar whether the lumber originates there or at Wilmington, or if any difference exists it is in favor of the through Wilmington business. Such higher charge on the Wilmington traffic is clearly against the rule of the Wight case. (Wight v. U. S. 167 U. S., 512, 42 L. Ed. 258, 17 Sup. Ct., Rep., 822), which lays down the principle that competitive conditions cannot excuse the imposition of a greater charge for like service under the Second section."

The facts in the case of the New York, New Haven & Hartford R. R. Co. v. Platt supra, are equally analogous to those in the case at bar.

The defendant, Platt, was receiver of the New York & New England Railroad Company, and published a joint schedule of rates purporting to apply on the transportation of coal from a point on his road to a number of points reached by the New York, New Haven & Hartford Railroad Company, under which tariff the New York, New Haven & Hartford Company received its full local charges to the destinations from the junction point with the New York

& New England Company. The latter company accepted the remainder of the published joint rate, which was less than the local rate established by the New York & New England Company from the place of shipment to the junction point; just as if in this case the railroad companies published a rate of 51 cents per hundred pounds, first class, on business from New York, leaving in effect the local rate of 60 cents to be applied to all other business.

The Commission said (p. 331):

"We are further of the opinion that the rates under consideration,—independent of the form or contents of the tariff in question,—are unauthorized by the Act. The defendant company is, of course, at liberty to make and publish any rates its chooses for transportation 'upon its route,' but such rates must be uniform for the same service and available to all shippers alike. Whatever rates it sees fit to accord are rates for carriage on its railroad, and must be applied as well to traffic destined to points on connecting roads as to traffic delivered at its own stations. In the absence of some agreement or understanding with a connecting line by which a joint tariff is authorized, a given carrier cannot, in our judgment, lawfully publish or apply any other rates than those which it fixes for transportation between the points reached by it; and the rates so fixed are the only lawful rates which such carrier can charge for any transportation service which it may perform, whether the traffic carried is destined to points on its own line or to points on the line of some · There must be lawful other carrier. rates upon each of the roads before there can be a lawful combination of rates. Every road is free to make its own rates, but no road of its own accord can charge more or accept less than its own rates for any service it may render. The

local rates of one road may be combined with the local rates of another road for the purpose of naming through rates which are merely the sums of two or more local rates, and no other or different through rates can be legally applied except by the mutual consent of connecting roads, or an implied agreement arising from their relations and previous course of business. A through rate made by such concurrent action is the 'joint' rate mentioned in the statute. Whatever the basis of division, the essential feature of a joint rate is that connecting roads have agreed or mutually consented to carry traffic from points on one road to points on another road for an aggregate charge which is less than the sum of their local charges between the same points. Without such agreement or consent neither of them has authority to name or allow a lower through rate than the combination of their locals."

In the case of

Wight v. United States, supra, the facts were these:

Two shippers were engaged in sending beer in car loads from Cincinnati to Pittsburg. One shipper had a switch track connection from his place of business with the P. C. C. & St. L. R. R. Co. The rate over this line was 15 cents per hundred pounds. The Baltimore & Ohio Railroad Company desired to obtain the business of this latter shipper, but if he sent his beer via the Baltimore & Ohio, it was necessary to haul the beer in wagons from the warehouse to the station. The Baltimore & Ohio, for this shipper only, reduced its 15-cent-rate from Pittsburg to Cincinnati by the amount that was necessary to pay for the hauling of the beer from the warehouse to the railroad station. It was held that

this was the giving of a rebate and created an undue discrimination within the provisions of the Act, and was a violation of Section Two. The Court said:

"It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

In the case at bar the two shippers are the shipper at New York and the shipper in the intermediate territory. The transportation in each instance is over the lines of the western railroads between the Mississippi and Missouri Rivers. As we have shown, this transportation and the services rendered in the performance of it are identical for the shipment of each shipper. Under the rule of the Wight case, the difference in rate necessitated by the order of the Commission must be illegal, and a violation of Section 2 of the act.

REASONS SUGGESTED BY THE APPELLANTS—THE COM-MISSION AND THE MISSOURI RIVERS MERCHANTS—IN SUPPORT OF THE ORDER OF JUNE 24, 1908.

There is, as shown, a discrimination in fact. We believe we have fairly shown that this discrimination is both undue and unreasonable. The record presents no recognized ground of difference in the circumstances and conditions of the haul between the rivers as applied to Seaboard freight or to freight originating in C. F. A. territory. Not only is there no difference in the haul itself, but there is no substantial distinction in the transportation in the broad sense, so far as concerns the parties in interest, the

Western roads on the one hand and their shippers. wheresoever located, on the other. No distinction can be made in the haul in regard to length, time, operation, character of the merchandise hauled, or the mode of handling in cost to the railroad or in value to the shipper. There is no commercial reason which should make the railroads desire to carry Seaboard freight cheaper than C. F. A. or local freight. There is no commercial reason which would make the C. F. A. or local shipper willing to pay more for the carriage of his freight between the rivers than the Seaboard merchant pays. There is no competitive route from the Seaboard territory to the Missouri River cities which would compel the inter-river roads to reduce their fares on Seaboard traffic or to leave it alone and decline to participate in the business on a lower basis of rates. Even where there is such competition it would lie wholly with the railroads to decide whether they desired to meet it by a reduction rates or to let the business go. To put the matter of competition in a word: There is no practical mode of reaching the Missouri River cities from the east except through the Mississippi River gateways. As the facts give no rational explanation of the Commission's order, based upon any known precedent, either of the courts or of the Commission itself, we must look elsewhere for the grounds urged in its support.

While the original complaint claimed that the rates between the rivers were too high, it never was directly contended that as between the C. F. A. shipper and the Missouri River shipper the equal rate between the rivers discriminated against the latter; much less has it ever been contended that the existing rates between the rivers discriminated against the Seaboard in favor of the C. F. A. territory. No such claims are made in the original complaint. No such contention is bolstered up by the Commission's decision, and, finally, neither before the Commission nor before the Circuit Court, was any evidence introduced tending to prove the existence of any such discrimination, even in fact. The Commission's decision is quite frank on this subject. It does not find that there is a discrimination in favor of the C. F. A. shippers. It expresses, on the contrary, its contention that an advantage should be created for the Missouri River shipper. Instead of reducing the rates between the rivers, as applicable to Seaboard traffic, the Commission had two other suggestions before it, (1) to reduce the rates east of the Mississippi River, and (2) to reduce the rates between the rivers on all traffic destined to the Missouri River. It refused to do either of these things, because neither would have given the desired advantage to the Missouri River merchants. In refusing to reduce the rates east of the Mississippi, the Commission said (Trans., 31):

"It seems patent that any change in the rates east of the Mississippi Piver, even if warranted, would fail to accomplish what the complainants desire, because whatever of advantage accrued therefrom to the Missouri River cities would accrue to a like degree or extent to their principal competitive commercial centers, to wit: New York, Chicago, St. Louis and the Twin Cities."

It should be remembered here that the Commission's finding was that the rate from the Atlantic

Seaboard to the Missouri River cities was too high. In another part of the opinion it is said that this is because the rate between the rivers is too high when used in connection with this traffic; but it is not difficult to see that the object of the Commission was not to reduce a rate, the reasonableness of which had been questioned by any evidence, but to disarrange the existing rate relation so as to confer an advantage upon the favored Missouri River section.

The Commission also suggested to itself the reduction of the "local class rates" of the defendant railroads between the rivers. This, however, it refused to do for the same reason which led it to refuse to reduce the eastern rates. The Commission said (Rec., 53; Trans., 32):

"If the local class rates of defendants between the Mississippi and Missouri Rivers were reduced, it would give the same degree of advantage to all the producing and distributing centers on and east of the Missouri River, and their relative advantages or disadvantages would not be changed."

It will be seen that in neither of these quotations, which are the very heart of the opinion, is there any suggestion that the existing rates are discriminatory against either the Missouri River or the Atlantic Seabcard merchant. Indeed, the Commission distinctly avows that the existing rate situation is fair to all. In the first quotation the change in the Eastern rates is rejected because, "whatever of advantage accrued therefrom to the Missouri River cities would accrue to a like degree or extent to their principal competitive commercial centers."

So, any change in the "local class rate" is re-

jected, because such a reduction would "give the same degree of advantage to all the producing and distributing centers on and east of the Missouri River, and their relative advantages or disadvantages would not be changed."

If ever there were a deliberate attempt to foster one section of the country at the expense of another, without rhyme or reason, this is it. That in so doing the Commission was not correcting a discrimination or reducing a rate unreasonably high per se is manifest from the backing the Commission gives to its own reach after extra authority, in the following statement in the decision (Rec., 54; Trans., 33):

"It must not, however, be assumed that a basing line for rates may be established and be made an impassible barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of, or hold upon, the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing or producing facilities, and increased traffic on railroads create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption."

It is the Commission which may be the judge when the time has come to make the alterations in the general rate situation. It is the Commission that may alter a basing line for rates established from all time. It is the Commission which alone can decide as to the right of possession at any time of such basing line by the cities or markets located upon it, and, finally, it is the Commission which here arrogates to itself the authority to say how or from what locality traffic shall be distributed to or from what territory lying beyond. This language is not the discussion or designation of an undue discrimination or of an excessive charge; this is not the pointing out of a rate unreasonably high under the first section, or giving an undue preference contrary to the second or third section; this is the assertion and exercise of sheer legislative power.

The Commission contends that the rates between the Rivers, as applied to traffic originating exclusively in the Seaboard territory and destined for the Missouri River points, should be reduced, on the ground that this is in obedience to a well known or "familiar rule" or principle, that the through rate between any two points should be less than the sum of the rates between any intermediate points.

It is noteworthy that in the decision of the Commission in the case at bar no such doctrine is enunciated. There the Commission was willing to express its real object, namely, as has been stated, the granting of a particular advantage to the Missouri River cities. The through rate in the Commission's mind is the rate from the Atlantic Seaboard to the Missouri River. The Commission might have cut this rate, either east of the Mississippi for all traffic, or west of the Mississippi for all traffic destined to the Missouri River points. Either reduction would have satisfied the "familiar rule," but neither would have given the desired advantage to the Missouri River cities.

The Commission's decision was immediately attacked by the bill filed in the Circuit Court for the Seventh Circuit in this case, claiming as its essential allegation, that the railroads were forced to make an unfair discrimination between shippers of different localities. The Commission thereafter took four opportunities to explain the Burnham-Hanna-Munger decision:

- (1) In the case of Kindel v. The New York, New Haven & Hartford Railroad, now before this court as Chicago, Burlington & Quincy Railroad Company v. Interstate Commerce Commission, No. 641, set for hearing with this case.
- (2) In the 22d Annual Report of the Interstate Commerce Commission for 1908.
- (3) In the Indianapolis Freight Bureau case, 16 I. C. C. R. 56.
- (4) In the 23d Annual Report of the Interstate Commerce Commission for 1909.

The comment of the report of 1908 upon the present case is as follows (Rec., 963; Trans., 469):

"The Commission ordered carriers between Mississippi and Missouri Rivers to apply rates somewhat lower upon traffic originating at the Atlantic Seaboard than would apply to the same kinds of traffic when originating at the Mississippi River, recognizing the familiar rule that the through rate for the long haul should be less than the sum of the locals for the two short hauls."

The subsequent expressions of the Commission on this subject are mainly valuable here as examples of the Commission's uncertainty and self-contradictions in seeking to explain its decision. The announcement in the report of 1908 is at least a single minded expression. We might have a right to take this statement as a correct exhibition of the Commission's views were not the Commission's other statements at variance with it.

Taking the statement by itself, however, we contend:

(1) Such a principle, if its exists, has no application to the case at bar, for the reason that the haul from the Atlantic Seaboard to the Missouri River points is not a combination of local hauls. The haul from New York, for example, to St. Louis is a through haul from the beginning of the Pennsylvania Railway, or such other system as may be used, to the end of its line at St. Louis. The haul from St. Louis to the Missouri River points is a through haul and through rates apply and are published as to both hauls, separately, for each. The rates between the Rivers, as cannot be too often pointed out, are neither local rates nor through rates, nor rates separately established to apply to any particular business. The Commission blunders when it speaks in its opinion (Rec., 55; Trans., 34) "of the defendants' 'separately established rates' which are 'applied to the through transportation.""

It is quite true, as has been often said, that the rate for a long haul should reasonably be less than the sum of the hauls between all the stations from the beginning to the end of the long haul, but there is no reason in this case for the application of any such piece of railroad economics.

The case of Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 257, is cited by counsel for the Missouri River shippers. The statement in that case by Mr. Justice Brown touches on the question of the

difference between a through and a local rate. The observations of Mr. Justice Brewer, in Chicago, etc., Railway Company v. Tompkins, 176 U. S. 167, are quoted in that case. Nothing could clear up the confusion better than these two statements. In both cases the court is speaking of a combination of local rates which are real local rates. These are short hauls between nearby stations. Mr. Justice Brown said (page 262):

"A through tariff is almost always fixed at a less sum than the aggregate of local tariffs between nearby stations upon the same road."

In the quotation from Mr. Justice Brewer's opinion in the Tompkins case the illustration given is of a single line of 100 miles with ten stations, and the contrast is made between one train starting from one terminus with through freight and going through to the other without stop, and the second train which starts with freight for each intermediate station. There is surely no support to the Commission's "familiar rule" to be got out of either of these cases.

The rule never could have any application to a haul performed over two wholly distinct railroad systems. More than 95 per cent. of the traffic from all territory east of the Mississippi is broken in bulk in the transfer to the western connecting line. The expense of this, as has been shown, is greater than the initial terminal expense in the taking on of local business. Hence, there is a new terminal charge for the western connecting line which is, no doubt, a greater terminal charge than the initial terminal expense of the line from the Seaboard.

The quotation from the opinion of Mr. Justice Brown in the Minnesota case, supra, distinctly recognizes the application of the rule to stations "upon the same road."

A reductio ad absurdum of the rule is reached by the witness McVann, who stated:

"It is true as a general fact in the making of railroad rates that a rate for a long distance haul, particularly where that long distance haul is participated in by more than one railroad, is less than the sum of any two rates within that haul."

But, as a matter of fact, the Commission did not apply the "familiar rule" at all.

(1) The rule, wherever it applies, should apply on the theory of a tapering rate. It will not do between the Rivers to give a lower rate to all territory stretching between the Atlantic Coast and five hundred miles inland and then give a higher rate between the rivers to the traffic originating in the next five hundred miles. This is no application of the theory that the through rate should be less than the sum of the locals; this is sheer zone development. To point out specifically how little the so-called principle is applied in the Commission's reduction: Erie is about 100 miles west of Buffalo. Erie is in C. F. A. territory, while Buffalo is in the Seaboard territory. For this arbitrary reason Buffalo has a rate between the rivers, under the order of the Commission of 9 cents less per hundred pounds on first class than is the rate on traffic originating in Erie. The line between the Seaboard and C. F. A. territory passes through Pittsburgh, yet Pittsburgh

is arbitrarily put in C. F. A. territory. Buffalo, through which the line also passes, is in Seaboard territory. The difference in distance from the Missouri River to both these cities is practically nothing. yet the Buffalo merchant gets a rate between the river 15 per cent. lower than is given Pittsburgh. Again, Parkersburg, West Virginia, is the extreme western point of the Seaboard Territory. It is 100 miles further west than Pittsburgh, yet merchants in the immediate vicinity of Parkersburg get a lower rate between the rivers than the Pittsburgh shipper. who is further away and whose haul to the river is longer. Conversely, if the doctrine were carried out, why should not the New York merchant get a lower rate between the rivers than the Buffalo merchant or the merchant of other localities situated toward the western limit of the Seaboard territory? But the most cogent reason of all: Why is not the rate from the Seaboard to the Mississippi River made to taper instead of the rate of the new haul between the rivers, which has nothing to do with the proportionate distance of the various points east of the Mississippi River?

If the intention of the Commission was simply to favor the extreme territories east and west, the reduction for this purpose was manifestly beyond its powers. If its intention was to apply a tapering rate on the theory of the "familiar rule," then it failed wholly to carry this object into effect.

(2) The reduction is about 15 per cent. on the first five classes of merchandise. There is no ground whatever for the amount of this reduction, and no explanation has ever been offered for it. So far as

it rests on any evidence or explanation, the reduction might have been 50 per cent. or 5 per cent. The prayer of the complainants before the Commission was for a reduction of about 40 per cent., from 60 cents first class to 33 cents, and no testimony was offered to give a reason for any other amount; and the Commission, in its finding, offers no clue to its own decision.

THE COMMISSION'S CONTENTION THAT IT HAS POWER TO ALTER THE RATE RELATIONSHIP BETWEEN DIFFER-ENT LOCALITIES OR SECTIONS OF THE COUNTRY.

This claim is contained in that portion of the opinion of the Commission already quoted; but the claim is so far beyond any hitherto put forward by the Commission, during its whole history, that it may be well to call attention to it again (Rec., 55; Trans. 33):

"Development of natural resources, increase in population, growth of manufacturing or producing facilities, and increased traffic on railroads create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption."

This is a sweeping assertion of the right of the Commission to legislate with reference to what it considers the commercial needs of the country, or the varying necessities for change in the comparative commercial value of any section.

The Circuit Court, as shown by its opinion, perceived that the intention of the Commission, by the bare terms of its order, interpreted by the language used in its opinion, was not to enforce any ordinary or "familiar principle" of rate making, but to extend its own power so as to enable it to revolutionize the existing rate structure of the country, by an act tantamount to legislative power, pure and simple. The court itself suggests (Rec., 2296-5-6; Trans., 1056-7), that the Commission may have power to enforce a system of tapering rates, "provided such tapering is both comprehensively and symmetrically applied." The Circuit Court then proceeded to say (Trans., 1057):

"But it does not follow that power of that character includes power by the use of differentials, to artificially divide up the country into trade zones tributary to given trade and manufacturing centers, the Commission, in such case having, as a result, power to predetermine what the trade and manufacturing centers shall be; for such a power, vaster than any that any one body of men has heretofore exercised, though wisely exerted in specific instances, would be putting in the hands of the Commission the general power of life and death over every trade and manufacturing center in the United States."

That the Commission is deliberately going so far as to warrant the language of the Circuit Court is shown in that part of the Commission's opinion last quoted. The Commission's power is to reduce unreasonable rates, or to alter those which are unduly discriminatory. But its claim here is not merely to make such "changes in rates" as the factors enumerated may suggest, but also to make changes "in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption." A

body which could do that is not a body of limited, but of the most general powers.

The Commission, in its 23rd Annual Report, vigorously denies the interpretation put by the Circuit Court upon its opinion in this case. It disavows, in so many words, "any attempt to create so-called 'trade zones' by the orders referred to." It admits that this is not the function either of the Commission or of the railroads. Indeed, the Commission says:

"The Commission further desires to state that so far as it understands the effect of these orders, they do not in fact create trade zones. The Commission has simply attempted to prescribe reasonable rates between the points named. It has said that a long-distance rate may properly be less than the sum of the shorter distance rates which make up the longer distance rate. * * The cost of the through service is less, ordinarily, than the combined cost of the two local services."

This defense evades the point at issue by a mere disavowal. While it may be true that on the same line a long distance rate may properly be less than the shorter-distance rates which make up the longer-distance rate, it is going far to apply that not invariable rule to the case of a through haul over independent connecting lines. There is no evidence in the record comparing the cost of through service with the combined cost of two local services, except the proof that where the through haul is on two connecting lines, the cost of terminal operation on the second line is greater.

At all events, the Commission so far in its reply to the Circuit Court simply quotes in its support the alleged general rule or "familiar principle" which we have shown was not even applied in the case. But the Commission, even in its denial of its own power to create trade zones, leaves itself a loophole in the words immediately following the quotation just made from its 1909 report:

"It is, moreover, necessary that for the purpose of uniting the widely separated portions of our country, long-distance tariffs should be somewhat less, in proportion to the actual cost of the service, than shorter-distance rates."

Here is a sweeping claim of power, as broad as that made in the original decision in this case. Moreover, it introduces a brand new element in contradiction to the general rule which it had just laid down. After saying that the cost of through service is ordinarily less than the combined cost of two local services, the Commission claims that long-distance rates should be less than shorter distance rates "in proportion to the actual cost of the service." Hence, the reason which is supposed to underlie the "familiar principle" is now discarded, and the new rule is enunciated, that the long-distance haul should be proportionately less than the short-distance haul, not because its cost is less, but irrespective of cost, as a general economic principle, derived from considerations of the geographical and commercial extent of the country. The "familiar principle" now becomes a mere means to a particular end, instead of an end in itself—a rule, that is, of universal application.

THE CONTENTION THAT THE NATURAL ADVANTAGES OF THE MERCHANTS OF THE CENTRAL FREIGHT ASSOCIATION CITIES SHOULD BE EQUALIZED BY A RATE ADJUSTMENT GIVING PREFERENCES TO THE CITIES OF THE SEABOARD AND TO THOSE OF THE MISSOURI RIVER.

As already seen, the Commission, in its opinion in this case, deliberately sought to confer advantages upon the Missouri River cities, as against "their principal competitive commercial centers, to wit: New York, Chicago, St. Louis and the Twin Cities"; and the Commission expressly refused to reduce the local class rates between the Mississippi and Missouri Rivers, because thereby the same degree of advantage to all the producing and distributing centers on and east of the Missouri River would be left the same, "and their relative advantages or disadvantages would not be changed."

Whatever the theory may be upon which the Commission attempts to support the reduction it made, the motive for the reduction was the wiping out of the natural advantages of the Mississippi River and C. F. A. cities. It is perhaps not too much to conjecture that had the result of the enforcement of a zone theory, or the result of the enforcement of a tapering rate theory, been to diminish the advantages of the Missouri River cities, as against their competitors, at or east of the Mississippi River, the reduction might not have been made. The proceeding on the part of the Commission was not academic.

The witnesses who testified on behalf of the Missouri River intervenors, some of whom were merchants at the Missouri River points, and some from New York and Boston, urged in their testimony the

right to an equalization of the natural advantages of Chicago, St. Louis and other Central Freight Asso-The character of those natural adciation cities. vantages has already been pointed out in this brief and quotations made from the testimony bearing thereon. Those advantages in favor of the western cities are the rapid comparative growth in population; the size of the western jobbers, and their ability in consequence to buy in larger quantities; the nearness of the great jobbers in the Mississippi River cities to their customers, including those at the Missouri River, as compared with the eastern cities; the consequent reduction in traveling expense; the greater familiarity and acquaintance of the local purchasers with their nearer sources of supply, the proximity in some lines of the manufacturer at Chicago, St. Louis, etc., to his source of raw material.

The testimony of Mr. McVann, secretary of the Omaha Grain Exchange (Rec., 1103-4; Trans., 542), explains from the standpoint of the Missouri River merchants why the Missouri River jobber does not do business to any considerable distance east of the Missouri River in competition with Chicago or St. Louis. He said:

"The ability of the Missouri River jobber to do business to the east of the Missouri River, in the State of Iowa, which is our territory east, is very limited. Of course the amount of territory that he can reach in that state depends entirely upon the factor of freight. That is to say a dry goods man might reach farther east in Iowa than a grocer or a hardware man, because the freight percentage of cost on his goods is lower expressed in cents per yard or in cents

per unit, whatever it may be. The grocery man therefore cannot get east but to a very limited distance and the dry goods man can go to a greater extent. Perhaps a hundred miles. State of Iowa is about 300 miles wide. Omaha jobber rarely, as far as my knowledge goes, gets over a hundred miles east of the Missouri River as a general proposition. I think it would be less than a hundred miles on the average. In going east of course he gets the competition of Chicago, Milwaukee, St. Louis, Peoria, Davenport, Dubuque and other points which are coming west to meet him and the freight situation cuts a figure immediately. business originating at the Atlantic Seaboard or in the territory west of there on which the Omaha merchant must pay the freight from New York or Pittsburg or Cleveland or Chicago if he buys there, naturally his ability to reach east is practically nothing as against that of the Chicago or St. Louis jobber who has the same rate for instance of 80 cents a hundred first class to a point within 50 miles of Omaha. as the Omaha man pays to Omaha.

Q. The result of that is then that the Chicago or St. Louis man under the present existing rate system has a practical monopoly of the surrounding territory and of the territory west until you approach a territory within about a radius of a hundred miles of the Missour. River?

A. As against the Missouri jobbers that is true. Pretty close down to a hundred miles from the Missouri."

The object of the testimony of this witness is to suggest a reason for overcoming that natural advantage which consists (1) of proximity to market, and (2) of the direction of the locality whence originates the commodity dealt in. If the goods subject to sale must be purchased both by the Chicago and the Omaha jobber in New York, the Chicago jobber

would of course have a much less rate than the Omaha jobber. If the rates break at Chicago or the Mississippi River, so that the through rate to Omaha is practically the same as the rate which must be paid by the Chicago jobber to Chicago, and from Chicago to the Missouri River, the Chicago jobber on New York goods will of course be able to compete with Omaha in territory nearer to Omaha than to Chicago. Had the goods originated in Denver, the conditions would have been reversed. Then Omaha could have traded successfully nearly to Chicago. The disadvantage of the back haul, as a matter of commercial necessity, makes against the city farther away from the place of origin of the goods.

Another slight natural advantage is sought to be attacked in the testimony of John H. Hillman (Rec., 1242; Trans., 610.) After stating that a jobbing house in New York has to pay or arrange for the payment of the local freight from New England factories to New York, the following questions and answers occurred:

"Q. If a Chicago house should buy from the same factory the rate he would pay on his goods would be the rate from the factory direct to Chicago?

A. That is right.

Q. And he would not pay the rate from the factory in to New York plus the rate out from New York to Chicago?

A. He would not.

Q. So then it is not true that a house like Marshall Field & Company buying from the factories in New England would have an advantage over you in New York on goods which were to be delivered say in Chicago?

A. Yes, I think they would."

Here, then is the case: The New England manufacturer has practically the same rate to Chicago that the New York jobber has; therefore, in competing at the Missouri River with the Chicago jobber, the New York merchant claims that the local rate from the factory to New York, entirely fair in itself, but which necessarily sets a preliminary burden upon the New York jobber, should be equalized not in the New York territory, but in the territory beyond Chicago between the two rivers. Even if there were any legal basis for requiring the equalization of natural advantages, such an application of the rule would put all commercial rate relations in confusion.

Seymur S. Mack, represented Austin, Nichols & Company of New York City (Rec., 1252-3-4; Trans., 616):

"Q. What advantage is there to a jobbing house in your line situated in Chicago or St. Louis in being nearer to the Missouri River cities, in doing business with them?

A. The question of time of delivery, the question of less damage in transit and I may

also add local prejudice.

Q. As far as the nearness is concerned, involving quicker transit and less damage, that is an advantage which nearness would give anywhere in the world, is it not; it is not peculiar I mean to Chicago or St. Louis?

A. Yes.

Q. Hasn't New York a like advantage with regard to its near-by consumers?

A. Yes.

Q. And every other city has an advantage of the like sort?

A. Yes.

- Q. So that there is nothing peculiar to Chicago and St. Louis, in that general proposition?
 - A. No.
- Q. Would you call that an advantage that Chicago or St. Louis and the other intermediate western cities were entitled to, naturally?
 - A. No.
 - Q. You do not think they are entitled to it?
 - A. No, not entitled to it.
- Q. There is nothing against the laws of trade or commerce in the fact that they do have and enjoy that advantage is there?
 - A. No.
- Q. Is it your opinion that that advantage derived from nearness to the consuming markets should be off-set by any artificial adjustment of railroad rates?
- A. I believe that a man should have such certain benefits in the rate that he could compete with far western territory, if situated in the east, and if situated in the west, that he could come from there east and compete with the eastern man.
- Q. Your view then would be that it would be only fair to reduce the rate from Chicago to, say, the Missouri River cities, so as to enable New York to be on a standard of equality with Chicago or St. Louis, in spite of their natural advantage from nearness to the market?
 - A. Yes.
- Q. And that that difference should be adjusted artificially, by action, I mean, of the Government or Interstate Commerce Commission, in this case?
 - A. That is my view of it."

The following quotation from the testimony of Charles H. Jones, a shoe manufacturer of Boston, who testified on behalf of the Missouri River intervence will be sufficient, finally, to indicate the nature of the contention for the equalization of the

natural advantages of Chicago and St. Louis (Rec., 1344; Trans., 658):

You if you were selling direct to the Missouri River cities would also now as things are to-day pay first class the same rate, that is the sum of the two locals, or \$1.48?

Yes, sir.

In a case like that (where the source of supply is in the east), which is somewhat different from the others which we talked about, St. Louis would have no advantage over you by reason of its nearness to the place of supply?

They have an advantage over us, but not an advantage in freight. They have lots of other advantages. Nearness to their market, intimacy with their trade, lack of expense for their traveling men and all that class of advan-

tages.

So far as the mere freight question is concerned, would you consider that you were entitled to a lower through rate so as to give the advantage to yourselves, or the Missouri River merchant, over the St. Louis man in the purchase of merely those articles?

A. We would feel this way, that if the roads could afford to haul the through traffic at a lower rate we were entitled to that lower rate to offset the other advantages which they have, so far as it would be possible to do it in the

matter of transportation.

Q. And the other advantages that you speak of which you would be entitled to offset in that way would be these advantages of intimacy with the people, less expense in traveling, and so on?

A. We formerly had 18 or 20 first class jobbing houses in the City of Boston jobbing shoes in that territory. Today there is not one, because the advantage in the traveling expense, and the nearness to the market, and all those things are so strong in favor of St. Louis and Chicago, that the eastern men could not compete, and they have gone out of business.

Q. That is simply a commercial advantage that is universal, in any kind of business, in any

part of the world?

A. Yes. You set up a first class competitor between you and your customers, and you might as well take to the woods. That is where you have got to go.

Q. That is a A. Yes, sir." That is a universal condition?

We have already cited Railroad Commission v. Galveston Chamber of Commerce et al., 115 S. W. Rep. 94, in support of the proposition that the Commission has no power to compel the railroads to enforce a rate which works an undue discrimination between localities. In that case the point was pressed that Houston, which was favored by the Commission, was entitled to preferences over Galveston, to equalize the natural advantages of the former. It will be remembered that the provision of the Texas act under consideration was a copy of Section 2 of the Act to Regulate Commerce. The court said (p. 99):

"The orders and rates complained of must be held to give an undue and unreasonable preference and advantage to Houston over Galveston. It is no answer to this to say that Galveston has natural advantages not possessed by Houston, and, therefore, notwithstanding the difference in freight rates, it can hold its own in a commercial contest with Houston. We do not believe that it was the intention of the Legislature in creating the Railroad Commission and vesting it with power to make and regulate rates and charges, to confer upon that body authority to make discriminations for the purpose of offsetting natural and other advantages possessed by localities and individuals."

Two pertinent decisions are quoted on this point by the Texas court. One of these is a decision by the Interstate Commerce Commission itself. In Eau Claire Board of Trade v. Chicago, etc., Ry. Co., 4 I. C. C. R. 77, the Commission, in an opinion by Commissioner Knapp, discussing the proposition whether or not rates should be so adjusted as to "equalize commercial conditions," says:

"That rates should be fixed in inverse proportion to the natural advantages of competing towns, with a view of 'equalizing commercial conditions,' as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its local and natural advantages, and any exaction of charges unreasonable in themselves, or relatively unjust, by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute."

The other case cited by the Texas court is Interstate Commerce Commission v. L. & N. R. Co., 73 Fed. 409. Here the court said, at page 427:

"If the Interstate Commerce Commission should undertake to regulate so vast a business as that of the commerce of the country, so as to overcome social, business and financial inequalities and conditions, the Act would at once become nugatory in the difficulties which would attend its execution."

CEBTAIN MISCELLANEOUS CONTENTIONS IN SUPPORT OF THE ORDER.

1. In the cross-examination of witnesses for the Railroad Companies or the Central Freight Association shippers by counsel for appellants it is sought to be brought out that the business of the shippers might be injured but would not be destroyed if the Commission's reduction went into effect. (Martin's testimony, Rec., 516, Trans., 245-249; Evans' testimony, Rec., 536, Trans., 255, 257.) Evans was asked by counsel for the Commission:

"Q. So that this 4-cent deduction is not a killing matter at all in your business, is it, according to your own statement?

A. It is; on the varnish certainly it is.

Q. On your other business?
A. I cannot say that it is."

At Rec., 544, Trans., 259, counsel for the Missouri River shippers followed the same line:

"Q. Assume for a moment that the profits you were making were 20c per hundred pounds and the new adjustment of rates occasioned a diminution of profit to 16c, do you fancy that the establishment that you have there would be wiped out of existence and they would refuse to do business because they have to absorb this loss of 4c?

A. I think so."

One of the best examples of the foundation attempted to be laid for this contention is in the crossexamination of Mr. Simmons of St. Louis by counsel for the Commission. (Rec., 639; Trans., 306.)

"Q. Isn't it true that if the proposed reduction goes into effect you will still do business at the same old stand and in the same territory that you now do business?

A. Yes, and at a less profit."

In cross-examination of Mr. Johnson of St. Louis the following occurred (Trans., 326):

"If it is true that this freight rate only makes a difference of \$4,500 to you and you say only

70% is affected then it simply means that instead of your having a profit of \$722,000 you

would only have a profit of \$717,500?

A. If your figures are right it looks as though that would be true. Who is going to pay that \$4,500? Must I put it on Jim Jones or John Smith out in Kansas and through there?

Q. It is not such a disastrous business as you thought, this freight rate business?

A. I did not say that it would put us out of business."

The doctrine that a discrimination to be unreasonable and undue must be sufficient to destroy a shipper's business hardly needs serious consideration. No matter how slight the discrimination, if that discrimination be undue, it is unnecessary to inquire beyond that point into the exact measure of its destructiveness.

2. Finally, it is contended by the Missouri River shippers and by the Interstate Commerce Commission that the Commission had no power to examine into the general subject in order to ascertain whether its action would create an undue discrimination or not; that it was bound by the limitations of the complaint made to it; that it might only relieve the shipper at the Missouri River; that if the limited relief given this shipper resulted in an undue discrimination to the shipper of other localities, the latter's rights could not be considered, because the Commission had no power to take a broad view of the subject. This contention, which would so bind the Commission as to make even its attempts at good productive of evil, is disposed of by

Cincinnati, etc., Railway Company v. Interstate Commerce Commission, 206 U.S. Here a complaint was made against the classification of soap. The railroads, after the complaint, amended their classification so as to give the complainant what was desired. The Commission, after a hearing, held the new classification wrong in that the amendment operated as a discrimination against third parties who were not parties to the proceeding. This was objected to by the railroad companies and the court said, page 149:

"We think the Commission in making an investigation on the complaint filed by the Proctor & Gamble Company had the power, in the public interest, dis-embarrassed by any supposed admissions contained in the statement of the complaint, to consider the whole subject and the operation of the new classification in the entire territory, as also how far its going into effect would be just and reasonable, would create preferences or engender discriminations; in other words, its conformity to the requirements of the Act to regulate commerce."

These appellees therefore respectfully submit that the Commission's order of June 24th, 1908, is void as being in excess of the power of the Commission and as giving an undue and unreasonable preference and advantage to the shippers of the Missouri River cities and of the Atlantic Seaboard territory and in subjecting these appellees and other shippers of the Central Freight Association territory to an undue and unreasonable prejudice and disadvantage.

Respectfully submitted,

WILLIAM D. McHugh,

Colin C. H. Fyffe,

Counsel for said Appellees.